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Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

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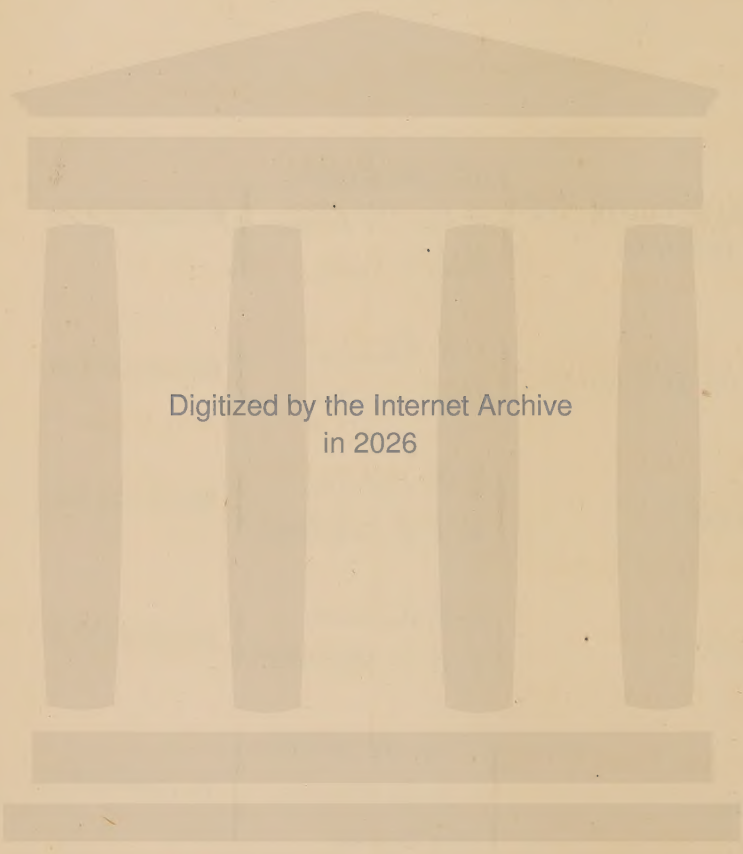

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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

In re WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY.

L. C. for M. R.
1873
Aug. 2, 4.
M. R.
Nov. 8.

Company—Winding-up—Creditor's Petition—Discretion of Court—Petition directed to stand over—Companies Act, 1862, *ss.* 80, 86, 91.

A creditor of a company who cannot get paid without a winding-up is entitled *ex debito justitiæ* to a winding-up order.

A creditor of a company who has, under sect. 80 of the *Companies Act*, 1862, served on the company a demand for payment of his debt, but has not been paid within the three weeks, is not necessarily entitled to an immediate order for winding up the company.

The 91st section of the *Companies Act*, 1862, is not confined to cases where a winding-up order has been made, but applies also where a petition for winding up is before the Court.

THE *Western of Canada Oil, Lands, and Works Company, Limited*, was formed towards the close of 1871, with a nominal capital of £450,000, divided into 4500 shares of £100 each. Of these shares 2250 were issued as fully paid up in part payment of certain pro-

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In re WESTERN OF CANADA OIL, LANDS, AND WORKS CO.

perty purchased by the company; the rest were never issued. The capital necessary for carrying on the company's business was raised by means of debentures, which were in form of covenants by the company to pay to the holder the principal thereby secured out of the profits of the company, together with a bonus, and also to pay yearly to the holder interest on the principal at the rate of 12 per cent. These debentures were all to rank *pari passu*, and were further secured by a mortgage to trustees of all the real and personal property of the company. They were issued to the amount of £200,000. A report and balance-sheet were issued, shewing that up to the 31st of December, 1872, a considerable profit had been made by the company, and these were laid before a meeting held on the 26th of May, 1873, and approved. The next instalment of interest, however, which fell due on the debentures on the 1st of July, 1873, was not paid. The debenture holders on the 16th of July held a meeting, at which nothing was said about winding up the company; but it was agreed that some one should be sent to *Canada* to investigate the affairs of the company, and a committee was appointed to look after the interests of the debenture holders. This committee caused a suit to be instituted in the Court of Chancery on behalf of all the debenture holders, seeking to establish a charge in respect of the debentures on all the real and personal property of the company, and to have that property applied in payment of the debentures. In this suit a receiver was appointed. A similar suit was also instituted in *Canada*. Afterwards Mr. *Sills*, a debenture holder, served on the company, in accordance with sect. 80 of the *Companies Act*, 1862, a demand for payment of the interest due to him. This demand was not complied with, and he thereupon presented a petition to wind up the company.

Mr. *Chapman*, another debenture holder, who had not served any demand on the company, also presented a winding-up petition, on the ground that the company was insolvent. Mr. *Chapman* had attended the meeting of debenture holders, and was proposed as a member of the committee, but declined to act. He did not, however, oppose or dissent from the resolutions passed at that meeting.

The debts of the company other than those due on the debentures were stated to amount only to £200.

August 2, 4. The Petitions now came on to be heard. The principal of the debts due to the Petitioners and those who supported them amounted to £20,000, while debenture holders to the amount of upwards of £95,000, desiring to have time to investigate the affairs of the company, opposed the making of an immediate order.

Mr. *Bagshawe*, for Mr. *Sills*:—

The demand made by my client has not been complied with, and by sect. 80 of the *Companies Act*, 1862, the company must be deemed to be unable to pay its debts. Under these circumstances a winding-up order is *ex debito justitiæ*: *Bowes* v. *Hope Mutual Life Insurance Company* (1).

Mr. *Jackson*, Q.C., and Mr. *Locock Webb*, for Mr. *Chapman*.

The Hon. *R. Butler*, for debenture holders who supported the Petitions.

Mr. *Roxburgh*, Q.C., and Mr. *C. T. Simpson*, for the company.

Mr. *Davey*, for the trustees of the mortgage deed.

Sir *R. Baggallay*, Q.C., Mr. *Whitehorne*, Mr. *T. A. Roberts*, and Mr. *Charles Walker*, for debenture holders:—

We ask for delay in order to enable us to investigate the affairs of the company. A large majority of debenture holders are in favour of this course, and the Court will have regard to their views: *Companies Act*, 1862, s. 91; *In re Brighton Hotel Company* (2); *In re Langley Mills Steel and Ironworks Company* (3); *In re Planet Benefit Building Society* (4). No harm can arise from the adoption of this course, for the property is protected by the receiver.

Mr. *Bagshawe* and Mr. *Jackson*, in reply, for their respective clients, urged that the order was *ex debito justitiæ*, and that the 91st section of the *Companies Act* only applied to cases where a winding-up order had been made; or, if it applied at all to the

(1) 11 H. L. C. 389. (3) Law Rep. 12 Eq. 26.
(2) Law Rep. 6 Eq. 339. (4) Ibid. 14 Eq. 441.

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hearing of Petitions, the Court would be influenced by the wishes of the creditors only to the extent of determining whether the winding-up should be compulsory or under supervision.

Lord Selborne, L.C.:—

I think that both these Petitions must stand over until the first Petition day in Michaelmas Term. The case made by the Petitioners is that this is a company that was recently started for operations on an extensive scale in *Canada*, and that it has been established mainly by a capital raised on debentures to the amount of £200,000, on which the interest has been regularly paid until the 1st of the month which has just expired (July). The Petitioners are persons who hold some of these debentures, and to whom the last instalment of interest, which became due on the 1st of July, has not been paid. One of the Petitioners at least has taken proper steps according to the statute to entitle him to present a Petition; and beyond all doubt it is my opinion that, unless the Petitioners get paid after giving proper and reasonable time within which they may be paid, if the company is able to do it, there ought to be a winding-up order.

But that does not at all involve as a necessary consequence that such order should be made now. The state of the affairs of the company appears imperfectly from the materials now before the Court, but so far as it does appear there is nothing to throw the least doubt upon the integrity and proper conduct of those who have had the management of the affairs of the company, and who have it now. The balance-sheet which was read to the general meeting which was held on the 26th of May last is produced, and if that balance-sheet gives a correct representation of the state of affairs of the company, it would appear that the company worked at a profit for the eleven months down to the 31st of December last, the profit being upwards of £17,320, and also that at the time the balance-sheet was made up (which I presume, though I am not quite sure, was the same time) there was a general balance of profit of $84,341, which may or may not be exclusive of some part of the claims of the debenture holders. In the absence of further explanation I should draw the inference that that balance-sheet is intended to include, in some shape or other, the amount of those

debentures; but whether it does so accurately and sufficiently I cannot at present say.

Then it further appears that the whole of this large class of creditors for £200,000 hold certain securities; they have specific charges, as I collect, upon the whole of the property of the company, and they have instituted two suits, in one at least of which a receiver has been appointed; and therefore everything is secure for their benefit; and although the present Petitioners are not Plaintiffs in those suits, they would have the benefit of them. Those suits do not preclude a winding-up order, but they go very far to shew that, so far as the whole class of creditors is concerned, a winding-up order is not immediately necessary for the protection of their interest in the property and of their eventual chance of being paid.

A meeting was held on the 16th of July, to which I infer all the debenture holders were invited to come, and it was attended, amongst others, by one of the present Petitioners, Mr. *Chapman*, for whom Mr. *Jackson* appears. I do not understand that Mr. *Chapman* or anybody else proposed a winding-up to the persons who were present, but that which was unanimously agreed to, Mr. *Chapman* not dissenting, although he declined to serve upon the committee, was, that there should be a person sent to *Canada* in order to investigate and ascertain the real state of the affairs of the company. That was agreed to be done, and that investigation is being proceeded with.

In that state of things I am asked immediately to make an order to wind up. That is asked at the instance of debenture holders who, including those who support the Petition, seem to have interests to the amount of £20,000; and I am told (although it is not verified) that there are some more who support the same view. On the other hand, by affidavit or by appearance before the Court, debenture holders of the same class, to the total amount, as I reckon, of £98,800, take the opposite view. If the 91st section applies, as I think it does, the duty which I have at this moment to perform is quite clear. A very large majority of the debenture holders think that their interests would be better promoted by delay, and the delay appears to me in the circumstances not unreasonable. I have no doubt that the 91st section is a

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part of the Act which is applicable before making any winding-up order, and when the Petition for winding up is before the Court, and that it does not presuppose a winding-up order, or relate only to the manner in which that shall be made, or the terms upon which it shall be made.

I entirely agree with the doctrine of Lord *Cranworth*—that if a creditor cannot get paid without winding up, it is *ex debito justitiæ* that he should have a winding-up order, but so far am I from thinking that it would be a certain consequence of delaying this case until November that the creditors would be denied payment, that I think there is at least a fair, possible, and reasonable chance of their getting paid by means of that delay very much earlier than they would be under a winding-up order, because it may turn out from the result of the investigation that assets will be sent over to this country for the purpose of paying the whole of the debts which are now unpaid and the interest now overdue.

I am, therefore, clearly of opinion that the proper course, as I have mentioned, is to direct the two Petitions to stand over until the beginning of Michaelmas Term.

Nov. 8. These Petitions came on again, in accordance with the direction given by the Lord Chancellor, before the Master of the Rolls.

No fresh evidence whatever had been filed.

Mr. *Bagshawe*, and Mr. *Locock Webb*, for the respective Petitioners, asked that a winding-up order might now be made.

The Hon. *R. Butler*, for debenture holders who supported the Petitions.

Mr. *Roxburgh*, Q.C., and Mr. *C. T. Simpson*, for the company.

Sir *R. Baggallay*, Q.C., Mr. *Whitehorne*, Mr. *T. A. Roberts*, and Mr. *Charles Walker*, for debenture holders who opposed the Petitions, asked for a still further delay, stating that a scheme for the reconstruction of the company was now being considered, and would probably be carried out.

Mr. *Bagshawe* objected that such a statement could not be received, more particularly as his client had given notice that he required any statement intended to be relied on in opposition to the Petition, to be verified by affidavit.

SIR G. JESSEL, M.R.:—

In my opinion the Petitioners are entitled to a winding-up order. The Lord Chancellor, in his judgment, has laid down what has also been laid down by other Judges as the doctrine of the Court. It is this: that a creditor of a company who cannot get paid, and presents a Petition for winding up, is entitled *ex debito justitiæ* to a winding-up order; but at the same time it is not to be said that this is a rule without exception, or that the Court has not power to direct the Petition to stand over.

Now these Petitions came on to be heard in August last. The debts in respect of which they were presented accrued only on the 1st of July previously; and the Lord Chancellor appears to have formed the opinion that if time were given money might come over from *Canada* to pay the debts.

[His Honour then read the concluding paragraphs of the judgment, and continued:—]

A delay of three months was thus granted to the company. After an interval of three months and four days the Petitions again come on. Not a word of evidence is brought forward to shew what has been done in the meantime; not a line of affidavit is put on the file to shew what investigations have been made, or what probability there is that the debts will be paid. I can only assume that the company have not chosen to avail themselves of the opportunity given them by the Lord Chancellor, and there must, consequently, be the usual winding-up order.

Solicitors: Mr. *Attwell;* Mr. *H. W. Vallance;* Messrs. *Wilkinson & Son;* Mr. *J. Holmes;* Messrs. *Lewis, Munns, & Longden.*

M. R.
1873
Nov. 6.

MARLER *v.* TOMMAS.

[1872 M. 31.]

Voluntary Settlement—False Recital—Recital of Payment of Money to Trustee —Promise to Trustee to Pay—Enforcing Promise—Power of Appointment by Deed—Exercise of Power—Transfer of Shares to Donee of Power.

A trustee executed a settlement declaring trusts of a sum of £2000 belonging to the settlor (a married woman), which sum was thereby untruly recited to be in his hands, upon the faith of a promise by the married woman to pay the sum to him out of her separate estate. The sum was never paid :—

Held, that neither the trustee of the settlement, nor a volunteer under it, could enforce the promise.

R. being trustee of shares in an unlimited company for Mrs. *F.*, a married woman, joined with Mr. and Mrs. *F.* in a deed whereby the shares were assigned to *L.* upon trust for Mrs. *F.* during her life for her separate use, and after her death as she should by deed or will appoint. Shortly afterwards Mr. *F.* died, and subsequently *R.* transferred the shares to Mrs. *F.*, who executed the deed of transfer :—

Held, that the deed of transfer was an exercise in favour of Mrs. *F.* of the power of appointment reserved to her.

THIS was a suit for the administration of the trusts of an indenture dated the 8th of June, 1865, and made between *George Field* and *Eliza Matilda*, his wife, of the first part, *Robert Marler* of the second part, and *Luke Marler* of the third part.

At the date of the indenture 100 shares in an unlimited company, called the *Railway Rolling Stock Company*, were standing in the name of *Robert Marler*, who had signed a memorandum dated the 12th of January, 1864, whereby he acknowledged and declared that the shares had been paid for out of moneys belonging to Mrs. *Field* on her own account; that he was a trustee for and on behalf of Mrs. *Field*; and that he would stand possessed of and interested in the shares in trust for Mrs. *Field*, her heirs, executors, administrators, and assigns, to be disposed of as she should from time to time request and direct. Mrs. *Field* was also at the date of the indenture entitled to considerable separate estate, including a sum secured by a charge in favour of *Robert Marler* on a leasehold house demised to *George Field*, her husband (which charge was stated to be nearly equal in value to the house), and certain furniture in the house.

The indenture contained a recital, amongst others, that *Eliza Matilda Field* was entitled to a sum of £2000, which immediately before the execution of the indenture had been paid or transferred to, and was then in the hands of, *Luke Marler*; and *Robert Marler* (as to the leasehold house and shares) and Mr. and Mrs. *Field* thereby concurred in assigning the leasehold house, the furniture belonging to Mrs. *Field*, and the 100 shares in the *Railway Rolling Stock Company*, to *Luke Marler* upon the trusts thereby declared; and it was declared that *Luke Marler* should stand possessed of the £2000 and the premises thereby assigned upon trust to invest the sum of £2000 as therein mentioned, and to pay the income to arise from such investments and the premises thereby assigned to Mrs. *Field* during her life for her separate use, and upon further trust to permit Mr. and Mrs. *Field* and the survivor of them to have the use of the house and furniture free from payment of rent or other payment, except payment of ground rent; and after the death of Mrs. *Field*, then (subject to the use and enjoyment of the house and furniture by Mr. *Field* during his life) to stand possessed of the trust property upon trust for such persons and purposes as Mrs. *Field* should by deed or will appoint, and, in default of appointment, upon such trusts for the benefit of the children of Mrs. *Field* by her then present or any future husband, as therein mentioned; and in default of any such child, in trust for the next of kin in blood of Mrs. *Field*, according to the Statutes of Distributions of intestates' estates.

The recital as to the payment of £2000 was untrue, and *Luke Marler* stated that he executed the deed at the urgent request of Mr. and Mrs. *Field*, and upon the faith of a promise made to him by Mrs. *Field* that she would forthwith pay the £2000 to him out of her separate estate. No such payment was ever made.

On the 15th of June, 1865, *George Field* died, having by his will bequeathed his residuary estate to Mrs. *Field* and appointed her executrix.

On the 22nd of July, 1865, Mrs. *Field* directed her solicitor to stamp the deed of the 8th of June, which then remained unstamped, and the proper stamps were affixed accordingly.

On the 29th of July, 1865, *Robert Marler* executed a deed of transfer, in the usual form, of the 100 shares in the *Railway Rolling Stock Company* to Mrs. *Field*, who also executed the deed of

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transfer, and thereby agreed to accept and take the shares subject to the rules and conditions under which the same were held by *Robert Marler*. This transfer was duly registered in the books of the company, and the shares were transferred into the name of Mrs. *Field*.

On the 20th of May, 1871, Mrs. *Field* intermarried with the Defendant, *Robert Tommas*. On the 20th of January, 1872, she died intestate and without issue, and letters of administration to her estate had been granted to *Robert Tommas*.

The Plaintiff was one of the next of kin of Mrs. *Field* according to the Statutes of Distributions, and as such entitled to one forty-ninth share of all property effectually settled by the deed of the 8th of June, 1865, and not appointed by Mrs. *Field*. The Defendants were *Robert Tommas* and *Luke Marler*.

The bill charged that Mrs. *Field* ought out of her separate estate to have paid, or caused to be paid, to *Luke Marler* the sum of £2000 to be held upon the trusts of the indenture of the 8th of June, 1865, and that *Robert Tommas*, as her administrator, ought to be decreed to pay that sum; and further, that the 100 shares in the *Railway Rolling Stock Company* (which remained standing in the name of Mrs. *Field*) were bound by the trusts of the same indenture; and that *Robert Tommas*, as such administrator, ought to be decreed to do all acts necessary to transfer the same into the name of *Luke Marler* as trustee of the indenture, or otherwise to give effect to the trusts thereof; and (in addition to a prayer for general administration of the trusts of the indenture) it prayed for a decree as to the £2000 and the shares accordingly. No question arose as to the house and furniture, which were admitted by the Defendant *Tommas* to be effectually settled by the indenture; but he submitted by his answer that the £2000 and the shares were not effectually settled, and further, that if the shares were so settled, the deed of transfer of the 29th of July, 1865, operated as an execution of the power of appointment reserved to Mrs. *Field* in her own favour.

The cause now came on to be heard.

Sir *R. Baggallay*, Q.C., and Mr. *Hadley*, for the Plaintiff:—

First, as to the shares. We admit that the settlement was voluntary, but it is quite plain that these shares were effectually settled. They were standing in the name of *Robert Marler*, upon

trust for Mrs. *Field*. Whether Mrs. *Field* was entitled to them for her separate use, or whether her husband had an interest in them, is not quite clear; but Mr. and Mrs. *Field* concurred in the settlement, and thereby declared trusts of their interests in the shares. These trusts are binding on them and persons claiming through them, and it is immaterial that *Robert Marler*, who was merely trustee of the shares, never executed a transfer to *Luke Marler*, the trustee of the settlement.

Then as to the transfer of the shares operating as an execution of the power of appointment, it is submitted that this is not so. The essence of execution of a power is intention, and there are no circumstances here to shew an intention to execute the power; in fact, the circumstance that Mrs. *Field* got the settlement stamped only seven days before the transfer to herself shews an intention to keep the trusts alive. In *Ellison* v. *Ellison* (1) there was a settlement of leaseholds which contained a power to revoke the settlement by deeds attested by two witnesses; the trustee of the settlement afterwards assigned the leaseholds to the settlor, who was tenant for life under the settlement. The settlor executed the deed of assignment, which was attested by only one witness; and upon this Lord *Eldon* observed: "Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the benefits given by the first deed to the children, and it is not inconsistent that he might intend to revoke some, and not all." In *Fletcher* v. *Green* (2) a fund was settled on a married woman for life for her separate use without power of anticipation, with power to appoint the corpus after her death by deed. She joined in a mortgage by which part of the fund was lent to the husband upon an improper security, which proved insufficient; but it was held that she had not, by executing that mortgage, appointed the reversion so as to make it liable for the loss.

[The MASTER OF THE ROLLS:—I do not find anything in the judgment to shew that that was so decided. All that was decided was that the fund must be restored; the married woman being restrained from anticipation could not affect her life interest, and as she was still living, the question as to the reversion was not ripe for decision.]

(1) 6 Ves. 656, 664. (2) 33 Beav. 426.

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The point was certainly contended for in argument, and after the decree made against them the trustees would have some difficulty in getting recouped out of the fund. In *Reith* v. *Seymour* (1) it was held that, where one moiety of a testator's personal estate was given to the executrix of the will for her life, with power of appointment after her death, the sale by the executrix of a sum of Consols constituting nearly the whole of the testator's estate, and investment of the proceeds in long annuities, was not an exercise of her power. *Hughes* v. *Wells* (2) also shews that the intention of the party executing a deed must be considered in determining whether or not the deed is an exercise of the power.

Next, as to the £2000. *Luke Marler*, by executing the deed containing the recital that £2000 had been paid to him, incurred a liability which was a sufficient consideration for Mrs. *Field's* promise to pay him the £2000 out of her separate estate; and *Luke Marler* might, and ought, to have enforced that promise.

[The MASTER OF THE ROLLS:—The promise could not have been enforced at law; you say that it might have been enforced in equity; but it seems to me that *Luke Marler's* equity was to get rid of that false recital.]

If he incurred a liability which it was necessary for him to get rid of, that was sufficient consideration for the promise; he might, therefore, have enforced it, being for valuable consideration; and if he had enforced it, the Plaintiff would have got the benefit of it.

Mr. *Fry*, Q.C., and Mr. *Beale*, for *Tommas*, were not called upon.

Mr. *Southgate*, Q.C., and Mr. *Alfred Smith*, for *Luke Marler*.

SIR G. JESSEL, M.R.:—

I think this bill attempts to place the rights of volunteers much too high. The case is this: A married woman being entitled to property was minded to settle it. Accordingly a settlement was executed, which contained a recital that the lady had paid £2000 to the trustee. That recital was not true; the £2000 has never been paid, and both husband and wife are dead. It is said that the lady promised the trustee to pay him the £2000 out of her sepa-

(1) 4 Russ. 263. (2) 9 Hare, 749.

rate estate, and the question is, can a bare volunteer enforce this voluntary promise against the assets of the person who made the promise? I am of opinion that there is no rule of equity which enables a volunteer to do this; consequently, this claim fails.

Then the second claim arises thus: Part of the settled property consisted of shares standing in the name of a trustee. A few days after the execution of the settlement the husband died, so that there was no longer any occasion for the settlement. After her husband's death the widow took a transfer of the shares to herself, and executed the deed of transfer. The settlement contained a general power to appoint by deed; a deed, as I have stated, was executed, but it is said that this was not a sufficient execution of the power, and it is contended that the shares are still subject to the trusts of the settlement.

Now, in the first place, the transfer appears to be inconsistent with the trusts. By accepting the transfer the widow made herself personally liable (for there is a liability attaching to the shares), which she ought not to have been. Again, the shares ought not to have been in her name, but in that of the trustee; and if the Plaintiff is right, the trustee has committed a breach of trust by permitting the widow to have the shares in her own name. But where is there any evidence that she was to hold the shares upon trust? A simple deed of transfer to *A. B.* does not imply a trust; and there does not appear to be anything which shews that a trust was intended here. On the contrary, the natural meaning of the transaction appears to me to be, that the widow took the property into her own keeping, the settlement being no longer wanted in consequence of the husband's death.

Both these claims therefore fail; and as *Tommas* was made a party simply in consequence of them, the bill must be dismissed as against him with costs. I cannot dismiss the bill wholly; for as against the other Defendant the Plaintiff is entitled to the ordinary administration decree, which I am bound to make, though I confess with regret, for I fear that the only result will be to exhaust the estate in payment of costs.

Solicitors: Messrs. *Robinson & Preston,* agents for Mr. *Alfred Pointon, Birmingham;* Messrs. *Mathews & Mathews,* agents for Messrs. *Mathews & Smith, Birmingham.*

M. R.
1873
Nov. 13.

BIBBY *v.* NAYLOR.

[1872 B. 123.]

Practice—Foreclosure Suit—Order of Revivor and Supplement after Chief Clerk's Certificate—15 & 16 *Vict. c.* 86, *s.* 52.

In a foreclosure suit, after decree for sale, and after the Chief Clerk's certificate, the Plaintiffs transferred the mortgage.

On an *ex parte* application by the transferee with the consent of the original mortgagees, an order of revivor and supplement was made under 15 & 16 Vict. c. 86, s. 52.

THIS was an application for an order of revivor and supplement in a foreclosure suit under 15 & 16 Vict. c. 86, s. 52.

After decree, directing an account of what was due for principal and interest on the mortgage, and ordering payment thereof or sale, and after the Chief Clerk had made his certificate, the Plaintiffs transferred their interest in the subject-matter of the suit to one *John Bibby*.

Mr. *North*, for *John Bibby*, with the consent of the original mortgagees, now applied *ex parte* for an order that the decree and the proceedings thereunder might be carried on and prosecuted at the suit of the said *John Bibby* against the Defendants, in like manner as they might have been by the Plaintiffs if they had not assigned their interest in the subject-matter of the suit, and as if the order had been made previously to the date of the Chief Clerk's certificate. He referred to *Ingham* v. *Waskett* (1), where a similar order had been made before the Chief Clerk's certificate.

SIR G. JESSEL, M.R., made the order.

Solicitor: Mr. *Wynne*.

(1) Law Rep. 11 Eq. 283.

MAXFIELD *v.* BURTON.

M. R.
1873
Nov. 17.

[1872 M. 142.]

Mortgage—Priority—Equitable Deposit—Marriage Articles—Purchaser for Value—Notice—Inquiry as to Deeds—Legal Estate.

L., the owner of real estate, deposited the title-deeds with his bankers to secure the balance of his account current, and executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Afterwards, being about to be married, he agreed to settle the property. Two days before the marriage the solicitor of the intended wife, having only then received instructions to prepare articles of settlement, inquired of *L.* whether he had the title-deeds in his possession unincumbered; he replied that he had, but that they were at his bankers. The solicitor made no further inquiry, and prepared articles of settlement, which were executed. After the marriage *L.* conveyed the property to the trustee of the articles upon the trusts therein contained, being for the benefit of the wife and issue of the marriage. A suit was afterwards instituted by the bankers for foreclosure; and the wife claimed to be a purchaser for value without notice:—

Held, that the solicitor had not made sufficient inquiry, and that the wife must be taken to have had constructive notice of the mortgage:

Held, also, that the husband, having contracted to execute a legal mortgage to his bankers, could not deprive them of priority by conveying the property to a party with whom he had entered into a subsequent contract for value, even although such party was a purchaser without notice.

The decision in *Sharples* v. *Adams* (1) approved of, but *dictum* therein questioned.

IN the year 1866 *Philip James Wale Ladkin*, being a customer of *Pares' Joint Stock Leicestershire Banking Company* (a company carrying on business at *Leicester*), deposited with that company the title-deeds of certain real estate belonging to him, and a policy of assurance on his own life; and he executed a memorandum whereby he acknowledged that such deposit was made to secure all moneys then due or thereafter to become due from him in account current with the company, and he agreed at any time thereafter, at the request of the company, to execute at his own expense any deed or deeds necessary for legally carrying out the security and for charging the hereditaments and other premises

(1) 32 Beav. 213.

M. R. 1873 MAXFIELD v. BURTON.

thereby intended to be a security or deposited with the company. Notice of the charge on the policy was given to the insurance company in April, 1866.

In March, 1871, *Ladkin* was about to be married to a lady then residing in *London*, and agreed to settle the real estate and policy on his marriage. Two days before the marriage a solicitor was consulted by the intended wife, and received instructions to prepare the necessary settlement. The solicitor, upon receiving such instructions, saw *Ladkin* in *London*, and inquired of him the particulars of the property he was about to settle. Upon being informed of such particulars, the solicitor further inquired if he had the title-deeds relating to the house and premises to be settled and the policy of assurance in his possession unincumbered. *Ladkin* replied that he had, but they were at his bankers, and that the title-deeds had been deposited there in his father's time. The solicitor, being thus led to believe that the deeds and policy were deposited for safe custody only, prepared articles for a settlement, whereby it was agreed that the real estate and policy moneys should be settled upon trusts for the benefit of the intended wife and the issue of the marriage. These articles were executed on the 15th of March, 1871, and the marriage took place on the following day. Subsequently, in May, 1871, *Ladkin* conveyed the real estate and assigned the policy to *William Burton* upon trusts in accordance with the articles.

There was no issue of the marriage of Mr. and Mrs. *Ladkin*.

In July, 1872, the banking company (to whom *Ladkin* was indebted on his account current to the extent of £1226) filed the bill in this suit by their public officer against *Burton* and Mr. and Mrs. *Ladkin* for foreclosure.

Mrs. *Ladkin* appeared separately from her husband, and put in an answer by which she claimed to be a purchaser for value without notice, and submitted that the settlement should have priority over the deposit and memorandum.

Mr. *Southgate*, Q.C., and Mr. *Field*, for the Plaintiffs:—

First: Mrs. *Ladkin* had constructive notice of the claim of the bank. She was told that the deeds were deposited with the bank, and if she had inquired of the bank she would have become aware

of the claim; and as she did not choose to make inquiry, she must be fixed with notice of everything which she might have learnt by using due diligence. It is the duty of a purchaser by marriage to make such inquiries just as much as it is the duty of other purchasers for valuable consideration: *Jackson* v. *Rowe* (1); *Wormald* v. *Maitland* (2).

Secondly: The effect of the memorandum was to make *Ladkin* a trustee for the bank; he subsequently, no doubt, became also trustee for Mrs. *Ladkin*, and the purchasers under the marriage articles; but, being a trustee for the bank, he could not give priority to Mrs. *Ladkin* by transferring the legal estate to *Burton*: *Sharples* v. *Adams* (3).

The MASTER OF THE ROLLS:—There is no doubt that you cannot gain priority by obtaining the legal estate from a trustee who commits a breach of trust in transferring it to you; but *Sharples* v. *Adams* seems to go beyond that, for Lord *Romilly* says: "If the owner in fee simple, having the legal estate, creates an equitable charge in favour of *A.*, and afterwards a second equitable charge in favour of *B.*, and then a third equitable charge in favour of *C.*, I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to *C.*, the owner of the third equitable charge, would not affect the rights of the first or second."

Mr. *Southgate*:—That is a *dictum* only, and possibly, having regard to the recent decision in *Pilcher* v. *Rawlins* (4), it may not now be possible to support it to the full extent; but it is not necessary for the decision, which, we submit, is unimpeachable.

Mr. *Blackmore*, for *Burton* and Mr. *Ladkin*.

Mr. *Langley*, for Mrs. *Ladkin*:—

The rule which governs these cases is laid down in *Hewitt* v. *Loosemore* (5) in the following terms: "That a legal mortgagee is

(1) 2 S. & S. 472.
(2) 13 W. R. 832; 12 L. T. (N.S.) 535; 6 N. R. 218.
(3) 32 Beav. 213.
(4) Law Rep. 7 Ch. 259.
(5) 9 Hare, 449.

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not to be postponed to a prior equitable one upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part; that the Court will not impute fraud or gross or wilful negligence to the mortgagee if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud or gross and wilful negligence to the mortgagee if he omits all inquiry as to the deeds." The same rule has recently been laid down in *Dixon* v. *Muckleston* (1). Here the intended wife's solicitor inquired for the deeds; he inquired also whether the property was unincumbered; he was told that the property was unincumbered, and that the deeds were in the hands of the bankers, whose place of business was at *Leicester*, for safe custody. There was no time to do anything more, and Mrs. *Ladkin* cannot be fixed with constructive notice unless she was guilty of fraud or gross and wilful negligence in not postponing her marriage.

Then as to *Sharples* v. *Adams* (2), that was a totally different case. There the person who conveyed the legal estate was trustee of the property for the person claiming priority; but here *Ladkin* was not a trustee for the Plaintiffs. It would be an entire novelty to hold that the owner of an estate is a trustee for everyone who lends him money on the security of it.

SIR G. JESSEL, M.R.:—

On the question of notice I have no doubt. This is clearly a case of constructive notice. A man on his marriage has a freehold estate; he tells the solicitor for the lady with whom he is about to be married, on being asked for his deeds, "they are deposited at my bankers for safe custody." The solicitor does nothing more, and it turns out that they are pledged to the bankers. I hold that it was the duty of the solicitor to make further inquiry of the bankers, and to ask for the deeds. If he had done so, he would have been told that the representation made to him of their being deposited for safe custody, which of course meant safe custody only, was incorrect, inasmuch as they were deposited by way of mortgage, and upon that mortgage a considerable sum of money

(1) Law Rep. 8 Ch. 155. (2) 32 Beav. 213.

was then due. I consider that that was constructive notice, and bound the lady who was about to be married. I am always very sorry in these cases for the wife, but at the same time one must consider that as between the bankers, who are the lenders, and the wife, who takes her husband for better or for worse, there is no equity other than that which the law raises. I cannot put the wife in a better position than the bankers; they are both purchasers for valuable consideration; and if, through the negligence of her adviser, the wife has got constructive notice, it is her misfortune. I prefer to decide the case on that ground, but I do not think I should be at liberty to disregard the fact that there was in this case a contract to convey for value, as well as a deposit, and I should not be the first to hold that a man who had entered into such a contract could subsequently, at his option, squeeze out the person who was entitled to the benefit of that contract by conveying the legal estate to a person with whom he has entered into a subsequent contract for value, even although that person should be a purchaser without notice. If it were necessary to resort to that, I should decide in favour of the Plaintiffs even on that ground. I wish to state so distinctly, because I am not quite sure that, without further authority, I should go quite so far as my predecessor did in the case of the illustration he gave in *Sharples* v. *Adams* (1). That I should reserve for further consideration. I think the Plaintiffs are entitled to the usual mortgagees' decree.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Mr. *L. Hand.*

(1) 32 Beav. 213.

M. R.
1873
Nov. 21.

ROWSELL *v.* MORRIS.

[1872 R. 28.]

Parties—Administration Suit—Executor de son Tort—Legal Personal Representative—Practice—Costs of the Day.

3 Ch D 198
200-5
12 Ch D 449

The legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate; and if he is not made a party, no decree can be made in such a suit, even although an executor *de son tort* and the trustees of the real estate are before the Court.

Rayner v. *Koehler* (1) and *Coote* v. *Whittington* (2) dissented from.

Where it is plain on the face of the bill that a suit is defective for want of parties, a Defendant raising the objection at the hearing is entitled to the costs of the day, although he may not have taken the objection by his answer.

THIS was a suit for the administration of the estate of *Jonas Rowsell*, who by his will, dated the 6th of December, 1864, gave, devised, and bequeathed all his real and personal estate to his wife *Joanna*, subject as to his personal estate to the payment of his simple contract debts, funeral and testamentary expenses, to hold his said real and personal estate, subject as aforesaid, unto his wife for her exclusive use during her life, she keeping all the buildings on the property in tenantable repair and insured in an adequate sum; and after her decease he gave his said real and personal estate to the Defendants *William Morris* and *William Payne Morris*, upon trust to sell and convert the same into money, and to divide the proceeds equally between all his children who should survive his said wife and live to attain the age of twenty-one years, and the issue living at the death of his said wife of any child or children who should die in the lifetime of his wife leaving issue, such issue to take the share or shares of their deceased parent or parents only, in equal shares if more than one; and he appointed his said wife sole executrix.

The testator died in December, 1864, leaving *Joanna Rowsell*, his widow, and four children him surviving, viz., three sons (the Plaintiffs in this suit) and a daughter, *Mary*, now the wife of *Charles Bartlett*.

(1) Law Rep. 14 Eq. 262. (2) Law Rep. 16 Eq. 534.

Joanna Rowsell never proved the will of the testator, but (according to the allegations in the bill) she possessed herself of his personal estate and entered into the receipt of the rents and profits of his real estate. She died in 1867 intestate, and letters of administration of her estate and effects had been granted to *Mary Bartlett*. The bill alleged that upon the widow's death *William Morris* and *William Payne Morris* possessed themselves of the testator's personal estate, and entered into receipt of the rents and profits of his real estate.

The bill was filed against *William Morris*, *William Payne Morris*, and Mr. and Mrs. *Bartlett*; and prayed that the trusts of the will might be carried into execution under the direction of the Court, and that the rights of all parties might be ascertained and secured for their benefit; that the Defendants *Morris* might be ordered to pay into Court any moneys forming part of the estate of the testator; that new trustees of the will might, if necessary, be appointed in the place of the Defendants *Morris*; and that a receiver might, if necessary, be appointed.

The suit now came on to be heard, and a preliminary objection was taken that a decree could not be made, inasmuch as the legal personal representative of the testator was not before the Court. This objection was not raised by the answer.

Mr. *Fry*, Q.C. (Mr. *Willis-Bund* with him), submitted that a decree could be made in the absence of the legal personal representative, citing *Rayner* v. *Koehler* (1); *Coote* v. *Whittington* (2); or, at all events, that a decree could be made for the administration of the real estate; and offered to accept a decree confined to the real estate, the personalty being of small value.

The MASTER OF THE ROLLS:—I cannot administer the real estate without also administering the personal estate.

Mr. *Mackeson*, Q.C. (Mr. *Badcock* with him), for the Defendants, referred to *Penny* v. *Watts* (3) and *Beardmore* v. *Gregory* (4), as being decisions at variance with those in *Rayner* v. *Koehler* and *Coote* v. *Whittington*; and claimed the costs of the day, although

(1) Law Rep. 14 Eq. 262.
(2) Ibid. 16 Eq. 534.
(3) 2 Ph. 149.
(4) 2 H. & M. 491.

11 Jur. N.S. 363.

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the objection for want of parties was not taken by the answer, the rule being that where the objection is apparent on the face of the bill, it is the duty of the Plaintiff to make the record perfect, and the Defendant need not raise the objection by answer; but where the objection arises from some fact within the knowledge of the Defendant, he ought to state such fact in his answer, and call the Plaintiff's attention to the defect: *Lowry* v. *Fulton* (1); *Furze* v. *Sharwood* (2); *Attorney-General* v. *Hill* (3); *Daniell's* Chancery Practice (4); *Morgan* and *Davey* on Costs (5). In *Wilson* v. *Broughton* (6) and *Cox* v. *Stephens* (7) the costs of the day were not given; but in the former case it did not appear from the report whether the defect was apparent on the face of the bill, and in the latter the attention of Vice-Chancellor *Kindersley* was not called to the decisions of Lord *Cottenham* in *Attorney-General* v. *Hill* and *Furze* v. *Sharwood*.

Mr. *Fry*, in reply, submitted that the authorities cited shewed that the rule as to costs of the day was not of universal obligation, and that it ought not to be applied where the authorities were conflicting as to whether there was a defect or not.

SIR G. JESSEL, M.R.:—

Although this suit relates to property of small value, and the argument has mainly been directed to the question of the costs of the day, still there is involved a question of general interest and no inconsiderable importance, namely, whether the Court can administer an estate without having before it the legal personal representative of the testator or intestate, where an executor *de son tort* or the legal personal representative of such an executor is before the Court. But for two recent decisions of the Vice-Chancellor *Malins*, I should have thought that that question was unarguable. I have always supposed that this Court could not make a decree for general administration in the absence of the legal personal representative. In *Rayner* v. *Koehler* (8), the first of his two decisions,

(1) 9 Sim. 104, 114.
(2) 5 My. & Cr. 96.
(3) 3 Ibid. 247.
(4) 4th Ed. vol. i. p. 277.
(5) Page 63.
(6) 7 L. J. (Ch.) 120.
(7) 9 Jur. (N.S.) 1144.
(8) Law Rep. 14 Eq. 262.

the Vice-Chancellor *Malins* decided the contrary; but he did not go into the subject very fully, nor perhaps very carefully. Then followed a case of *Cary* v. *Hills* (1), in which my predecessor, Lord *Romilly*, declined to follow *Rayner* v. *Koehler* (2). Then came *Coote* v. *Whittington* (3), the second of the two cases, and in it unquestionably the Vice-Chancellor did examine the subject with the greatest minuteness and care. I have read his judgment most carefully, but am unable to follow his reasoning or to agree with his conclusion. I should not, however, have ventured to express so strongly my dissent from the Vice-Chancellor, had not my attention been called to two decisions which are in opposition to his, one by Lord *Cottenham*, *Penny* v. *Watts* (4), which is binding on me, and the other by Lord *Hatherley*, *Beardmore* v. *Gregory* (5), which is not absolutely binding, but is of equal authority with the decisions of Vice-Chancellor *Malins*, and I should prefer to follow it in a case where difference of opinion exists.

Such being the state of the authorities, I must hold the law of the Court to be, that a suit for administration is defective when the legal personal representative is not before the Court. The cause must therefore stand over, with liberty for the Plaintiffs to amend by adding parties.

The next question is, whether the Defendants are entitled to the costs of the day, the objection not having been taken by the answer. My impression was (and the view of so experienced a Judge as Vice-Chancellor *Kindersley* appears to have been the same), that the Defendants were not so entitled; but I find that the subject was carefully considered on two occasions by Lord *Cottenham*, who decided that if the objection appears on the face of the bill, it is the duty of the Plaintiff to make his suit perfect, and that it is not the duty of the Defendant to give notice of the objection.

The costs of the day must, therefore, be allowed.

Solicitors: Mr. *Silberberg*; Messrs. *Surr & Gribble*.

(1) Law Rep. 15 Eq. 79.
(2) Ibid. 14 Eq. 262.
(3) Law Rep. 16 Eq. 534.
(4) 2 Ph. 149.
(5) 2 H. & M. 491.

Explained. Re HARARI'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 430.

M. R.

1873

Nov. 24.

BETHELL *v.* ABRAHAM.

[1873 B. 285.]

Administration Decree—Powers of Management—Discretion of Trustees—Investment—Control by Court.

1 Jeff Cas 433
21 LJ D575-8

After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the Court; and the Judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—

Held, that if the trustees had the discretion they claimed (which was doubtful), the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed.

THE late Lord *Westbury*, by his will, dated the 13th of January, 1866, appointed four trustees to whom he devised and bequeathed all his property of every description (except the things thereinafter specifically given) upon the trusts thereinafter mentioned. The testator then directed, that for the period of five years, to be computed from the day of his death, there should be paid quarterly certain annuities to the persons therein mentioned, being various members of his family; and the will then proceeded as follows:—

"All the residue of the income of my estate shall be accumulated and invested at the discretion of my trustees during such five years, and the money also receivable on my policies shall be invested at their discretion. My trustees shall not be obliged to alter any investment, or to convert perishable into permanent securities, but may continue or change securities from time to time as (*sic*) the majority shall seem meet.

"At the end of five years a full account and valuation shall be made of my estate, and the following sums (with proportionate abatements if necessary) shall be paid equally."

The testator then specified large sums of money, which in some

cases were directed to be paid to certain of the aforesaid annuitants, and in other cases were settled for the benefit of the annuitants, or their husbands or issue.

Some of the persons interested in these settled legacies were infants.

The testator died on the 20th of July, 1873. Shortly afterwards the present suit was instituted for the administration of his estate, and a decree was made therein in August, 1873.

A summons was taken out by the Plaintiffs (who were two of the trustees of the will) asking that they might be at liberty to sell certain of the testator's investments, and to invest the proceeds and also the moneys receivable on the testator's policies of insurance in certain specified securities, comprising *United States* Federal Funded £5 per Cents., *United States, Baltimore,* and *Ohio* Railway 6 per Cent. Bonds, &c. This summons was adjourned into Court, and was supported by the affidavits of the Plaintiffs and of another of the trustees, who stated that they were desirous of exercising the discretion conferred on them by the will in manner proposed by the summons.

It appeared that the testator had at the time of his death considerable sums invested in similar, though not precisely identical, securities.

Mr. *Fry,* Q.C., and Mr. *Everitt,* for the Plaintiffs :—

We submit that the testator has, by his will, conferred on the trustees an absolute discretion as to the investments to be made, and that this discretion is not taken away by the decree which has been made, but that it is necessary to obtain the leave of the Court before it is exercised. That leave we now ask.

In *Webb* v. *Earl of Shaftesbury* (1) the question arose as to the exercise of a power of appointing new trustees after a decree for administration had been made; and Lord *Eldon* distinctly laid it down that the Court did not prevent the exercise of discretion by the person in whom the power was vested, but only took care that the discretion should be duly exercised. Again, in *Cafe* v. *Bent* (2), Vice-Chancellor *Wigram* says: "Where, indeed, the Court has assumed the execution of the trusts, it would be highly incon-

(1) 7 Ves. 480. (2) 3 Hare, 245, 249.

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venient, if not impracticable, that the trustees should afterwards act independently of the Court. The Court does not, however, in the absence of any misconduct in the trustees, deprive them of the exercise of their discretion, but only requires them to act under the control of the Court." In *Widdowson* v. *Duck* (1) Lord *Eldon* lays down the rule in these terms: "The principle acted upon by former Chancellors is, that after a decree an executor cannot deal with the assets for the purpose of investment without the leave of the Court." In *Sillibourne* v. *Newport* (2) the trustees had power at their discretion to apply any part, not exceeding one moiety of the income of the testator's estates, towards the maintenance or education or otherwise for the benefit of a particular person; and it was held that this power might be exercised, notwithstanding an administration decree.

[The MASTER OF THE ROLLS:—I should have no doubt as to a case such as that. The power was in the nature of a power of appointment, and I have always considered that the doctrine of *Webb* v. *Lord Shaftesbury* (3) applied only to powers of management; and the power of investment in the will now before me appears to be of the nature of a power of management.]

We submit that it is more than that. The testator does not contemplate the division of his estate until the expiration of five years from his death. At the expiration of that period large sums will become payable, and large powers are conferred on the trustees in the meantime, with the view of enabling them to make provision for the demands which will then be made on the estate.

[The MASTER OF THE ROLLS:—Is it quite clear that you have the discretion you claim? The testator says, the trustees "may continue or change securities from time to time, as to the majority may seem meet;" these words would be satisfied if the discretion were confined to determining the time at which a change of securities is to be made; there are no words shewing that if a change is made the trustees may invest in the way the majority of them

(1) 2 Mer. 494, 499. (2) 1 K. & J. 602.
(3) 7 Ves. 480.

think fit; must not then the mode of investment be left to the operation of law?]

We submit that the discretion must extend not only to the time but to the nature of the investment. The words "from time to time" provide sufficiently for the time; the words "as to the majority may seem meet" provide for the manner in which the change is to be made. At all events, the policy moneys are to be invested "at the discretion" of the trustees; and those words cannot be limited to time merely; they must mean "at their uncontrolled discretion."

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., Mr. *F. Harrison*, and Mr. *Rowcliffe*, for other parties.

SIR G. JESSEL, M.R.:—

I am not satisfied that the trustees have the power they claim. It is not necessary for me at the present moment to say more than that. I have already indicated in the course of the argument why I am not satisfied on that point. But if they have the power they claim, I am not satisfied that I ought to exercise the power (which I undoubtedly have) of controlling their exercise of discretion in the way which they desire, namely, by acceding to the request to make these investments, which in the eye of this Court are speculative. I do not say they are really such, for that I know nothing about; but they are speculative so far as this Court is concerned; so that even if I thought the construction of the will other than I do think it, I should not grant this application. However, I should like to say this, that (if I rightly understand the doctrines of the Court) as long as an estate remains to be administered in this Court, the Court does not allow a purchase to be made, or a mortgage, or any other investment to be made, unless the Court is satisfied of its safety. There is a reason for that. The Court has to protect the property for all claimants, and even where the trustees have an undisputed power to make a purchase, or to make a mortgage, a reference is made, generally to Chambers, to ascertain the propriety of the investment which is intended to be made, that is to say, its propriety in all respects. In no case, therefore, should I have entertained this application for a moment, except subject

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to that qualification; but holding the opinion I do, that it is not a proper mode of investing the money of infants to put it into American railway stocks and securities, there is no occasion for me to send the matter to Chambers. As I understand the practice, I am bound to exercise my personal discretion in the matter. I do not mean to say that this is not a case that can be appealed, because it would be for the Court of Appeal to decide whether the discretion is personal in that sense; but I do understand the practice of the Court to be, that a Judge does exercise a personal discretion, that is, exercises a discretion according to his own judgment as to the safety and propriety of a proposed investment. Therefore I feel bound to add, that if I were satisfied by the argument—which I am not—that the trustees have this power, I should have declined absolutely to sanction the proposed investment.

Solicitors: Messrs. *Harrison, Beal, & Harrisons;* Messrs. *Gregory, Rowcliffes, & Rawle.*

RAGGETT *v.* FINDLATER.

[1871 R. 146.]

Trade Label—"Nourishing Stout."

V.-C. M.
1873
Nov. 6, 10, 11.

An injunction to restrain the use by the Defendants upon their trade label of the term "Nourishing Stout," which the Plaintiff had previously used, refused, on the ground that "Nourishing" was a mere English word denoting quality.

5 Ch D 357, 8
361-3
7 Ch D 586
88 3
3 Ch Ca
381
9 Ch D 47

THE bill in this case, which was filed in November, 1871, stated that in the year 1855 the Plaintiff purchased from Messrs. *Blockey* their business as brewers and vendors of stout. That the Plaintiff devoted himself to the study of improving and bringing such stout to perfection, and rendering the same a wholesome and nourishing beverage. That the manufacture of the stout was based upon a particular method or process, whereby the earthy phosphates, or nutritive salts of the malt, which afford mineral nourishment to the bones and nerves of the body, were more fully and completely extracted and developed than was ordinarily the case, and the stout rendered by such means easier of digestion and more nourishing than other stout not manufactured by such process; and before the year 1860 the stout so manufactured and sold by the Plaintiff had acquired considerable celebrity and was known to the public as "Nourishing Stout." That samples of the stout were analyzed by Dr. *Hassall* in the year 1860, and approved of by him, and the Plaintiff thereupon adopted and registered a trade label, under which the stout was always sold, such label having the words "Nourishing *London* Stout" round the circumference, and in the centre the words "*Raggett*, late *Blockey*. Analyzed and reported on by Dr. *Hassall*." That the Plaintiff had appointed agents for the sale of this stout in various towns, including *Brighton*, and there had been an extensive sale of it. That the Defendants carried on the business of wine, spirit and stout and ale merchants in *London*, and also at *Brighton*, under the style of *Findlater, Mackie, & Co.*, and in the month of September, 1872, the Defendants, in order to mislead their customers

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and the public, and to induce them to believe that when purchasing stout from them they were purchasing the "Nourishing Stout" so manufactured and sold by the Plaintiff, began to issue circulars holding themselves out as vendors of "Nourishing Stout," and about the same time they adopted and attached to the bottles and other vessels containing the stout sold and supplied by them, labels having the words "Nourishing Stout, bottled by *Findlater, Mackie, & Co.*, 16, *Prince Albert Street, Brighton,*" printed in letters similar to those in the Plaintiff's trade-mark, such labels being designedly intended to be imitations of the Plaintiff's trade-mark, or only colourably differing therefrom.

The bill prayed an injunction to restrain the Defendants from attaching to any bottles, casks, or other vessels containing stout, not being the "Nourishing Stout" sold by the Plaintiff, any of such imitation labels, or any labels with the Plaintiff's trade-mark, or any mark in imitation thereof or only colourably differing therefrom, or with the words "Nourishing Stout" impressed thereon.

In December, 1871, an injunction was applied for, but the motion was ordered to stand to the hearing.

The bill was then amended, and the passage having reference to the particular method of brewing the stout was struck out, and the Plaintiff then stated that the improvement in the quality of the beer, and its peculiarly nourishing properties, were caused by the addition of certain ingredients (which were not disclosed) added to the barrels after they had been delivered into his stores by the brewers, Messrs. *Truman, Hanbury, & Co.*, and that such process had been adopted by him since the month of March, 1871.

The Defendants, by their answer, denied that the labels used by them in the sale of their stout had any resemblance to those used by the Plaintiff, and they denied that such labels were adopted with a view to induce the public to believe that the stout sold by them was the same as the Plaintiff's. That, on the contrary, the label was of an oval shape, instead of being round like the Plaintiff's; and that although the words "Nourishing Stout" were printed round the circumference, the centre was filled up by the words "Bottled by *Findlater, Mackie, & Co.*" That in fact this label was similar to the label they had for a long time used for

their dinner ale, the only difference being the substitution of "Nourishing Stout" for "Dinner Ale." That the said stout was purchased from Messrs. *Truman, Hanbury, & Co.*, and was bottled by these Defendants as stated on the label. That the word "Nourishing" was merely a term used to denote a particular stout, which was always considered by the trade and by the public as of a nourishing quality. That the word "Nourishing," as applied to stout, had often been used by other vendors of stout, and that they had as much right as the Plaintiff to sell stout under that denomination.

A great many witnesses had given evidence on both sides, and among others several medical gentlemen. Those on behalf of the Plaintiff stated that they had tasted the stout supplied to the Plaintiff by the brewers, and the same stout after it had received the addition of the ingredients used by him; and that they found the stout after such addition to be different in flavour, and to be of a more nourishing quality and better adapted to the purposes of digestion.

On the other hand, the witnesses for the defence denied that there was any difference in quality between the stout sold by the Plaintiff as "Nourishing Stout" and the stout supplied by Messrs. *Truman, Hanbury, & Co.;* and one witness in particular, Mr. *Rogers*, a surgeon, stated that he had analyzed the Plaintiff's stout and the stout supplied by Messrs. *Truman & Co.*, and had found them in all respects identical.

Mr. *Cotton*, Q.C., and Mr. *Woodhouse*, for the Plaintiff:—

The words "Nourishing Stout" have been used by the Plaintiff as a trade-mark for many years, and the beer sold by him has acquired a reputation under that title; he has, therefore, a right to the profit which may be derived from that trade-mark. The Plaintiff alleges that the particular quality of stout manufactured by him is of a more nourishing character than other stout, and of this fact there is ample evidence given by the medical men who have tasted it; but whether this is the case or not, he is still entitled to prevent other dealers in stout from using his trade-mark.

Many cases of a similar nature have already been decided tending

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to prove the equity of the Plaintiff. In *McAndrew* v. *Bassett* (1) the Plaintiff established a right to the use of the word "*Anatolia*," as applied to liquorice. That term was in fact derived from the district from which the liquorice was exported, and all liquorice coming from *Anatolia* was known in the market under that title; it was the description of the article; but as the Plaintiff was the first person who sold it stamped with the word, he was held to be entitled to the sole use of it as a trade-mark.

The *Glenfield* Starch case, *Wotherspoon* v. *Currie* (2), is another of the same description, in which your Honour's decision was affirmed by the House of Lords. There, the term "*Glenfield*" was derived from the place in which the starch was first made, and the Defendant was restrained from using that name although he lived in the same village, and his starch was as much *Glenfield* starch as the Plaintiff's. In *Ford* v. *Foster* (3) the Plaintiff was held to be entitled to the use of the word "Eureka" as applied to shirts, because he first used it, notwithstanding that shirts of a particular make were well known and sold in the trade by all shirt-makers under that description. A similar decision was arrived at in *Broadhurst* v. *Barlow* (before Vice-Chancellor *Wickens*, Nov. 21, 1872), *Seixo* v. *Provezende* (4), *Knott* v. *Morgan* (5), *Cocks* v. *Chandler* (6), and *Braham* v. *Bustard* (7).

In *Lawson* v. *Bank of London* (8) the Plaintiff failed on a technical ground, but in *Lee* v. *Haley* (9), affirmed on appeal from this Court, the Defendant was restrained from using the term "Guinea Coal Company," on the ground that it was calculated to mislead persons into the belief that his business was that of the Plaintiffs. Here we say that the public are misled into the belief that when they are purchasing the stout sold by the Defendants they are buying the Plaintiff's stout, because the distinguishing name is "Nourishing Stout."

Then, on the question of the label used by the Defendants, there is so close a resemblance that any person might be misled.

(1) 4 D. J. & S. 380.
(2) Law Rep. 5 H. L. 508.
(3) Ibid. 7 Ch. 611.
(4) Ibid. 1 Ch. 192.
(5) 2 Keen, 213.
(6) Law Rep. 11 Eq. 446.
(7) 1 H. & M. 447.
(8) 18 C. B. 84.
(9) Law Rep. 5 Ch. 155.

Mr. *Glasse*, Q.C., and Mr. *F. A. Lewin*, for the Defendants, were not called upon.

SIR R. MALINS, V.C.:—

This is a bill filed by the Plaintiff, *George Raggett*, who is a dealer in stout and other articles, to restrain the use of that which he calls his trade-mark. The case involves considerations of very considerable public importance, because it is of the highest importance that, on the one hand, every protection should be given to trade-marks when fairly and properly used, and when used within just limits, and, on the other hand, it is of equal importance that, by the use of a particular word or anything which may be called a trade-mark, the right should not be unduly extended so as to infringe on the right of traders to call their articles by a quality they possess, or to give an undue protection to any man who happens to use a particular word. It appears that Mr. *Raggett*, about thirteen or fourteen years ago, bought a business of a person named *Blockey*. It is not in dispute that *Raggett* is entitled to all the rights which *Blockey* had. *Blockey* became a considerable seller of stout, and he adopted, and *Raggett* has continued, or at all events *Raggett* now adopts, a circular label or trade-mark of this description, "Nourishing *London* Stout." That must be read separately, "Nourishing" at the top, "*London* Stout" at the bottom. Then, in the centre of the circular, there is this: "*Raggett*, late *Blockey*. Analyzed and reported on by Dr. *Hassall*. Trade Label B. 21 *Duke Street, St. James'*." That is the trade-mark.

So matters went on. *Raggett* continued to sell his stout as "Nourishing Stout" until about the year 1870, when he found that the Defendants and some other persons were selling stout under the name of "Nourishing Stout." The Plaintiff remonstrated with the Defendants, and they set up that they were entitled to use the word "Nourishing" as part of the description of their stout.

The first question, and a very material question, is, what is the trade-mark of the Plaintiff, if he has a trade-mark at all? His case has been argued in this way: that the word "Nourishing" is his trade-mark—"Nourishing" *London* Stout. But I must take the whole label as being his trade-mark; and it is only justice to

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these Defendants to say that if, as the Plaintiff contends, it was their object fraudulently to imitate his trade-mark, I have never seen a case in which there was so singular a failure in imitation, or in which I should have more readily come to the conclusion that it could not have been their intention to imitate or deceive. Here are the two labels. First of all, the size is totally different; secondly, one is circular and the other is oval. The Plaintiff has all this written description of his own name: "*Raggett*, late *Blockey*. Analyzed and reported on by Dr. *Hassall*." What do the Defendants do? Surely, if their object had been fraudulent, and that which the Plaintiff attributes to them, namely, a desire to possess themselves of the Plaintiff's trade by palming off on the public their stout as the Plaintiff's stout, they could have had something more resembling his trade-mark than this. Suppose I take the trade-mark to be "Nourishing *London* Stout," which I cannot do, for I must take the whole; the Defendants had already possessed a label for ale, the description of which is "Superior Dinner Ale," they desired, at the end of the year 1870, to alter their label, or to have a known label with regard to stout. It has been said by the Plaintiff's counsel, "Why, of all words, did they adopt the word "Nourishing"? But in all other respects they have departed from his mark, because they simply put "Nourishing Stout," and "Bottled by *Findlater, Mackie, & Co.*, 16, *Prince Albert Street, Brighton*." That is the whole trade-mark. In all these cases of trade-marks there is generally such an imitation of the trade-mark, be it a label, or a word, or anything else, as to deceive the public.

The cases are very numerous, and they have been cited at very great length; many have occurred, and I have had a great many myself since I have sat in this chair, and there has been in almost every case a studious imitation, or something on the part of the Defendant who is sought to be restrained which shews that his object has been to mislead the public, and induce them to believe they were buying the Plaintiff's goods when they were buying those of the Defendant. I repeat, that if this were the object of these Defendants, they have signally failed in imitating the trade-mark of the Plaintiff. If I take the Plaintiff's trade-mark as that round label, this of the Defendant is so dissimilar

that one cannot be mistaken for the other. It is in evidence, and plainly proved, that persons who attach importance to this "Nourishing Stout" know it as *Raggett's* or *Blockey's*, or, at all events, as that which was analyzed by Dr. *Hassall*. There is no approach to that in the Defendant's label. Therefore, if I take the two labels together, I cannot impute fraudulent intent to these Defendants to imitate the label of the Plaintiff.

However, the case has been argued on much higher grounds than these, because the Plaintiff does not stop short of claiming an exclusive property in the word "Nourishing." I have pressed the learned counsel with the difficulties that weighed on my mind as to whether it is possible for a person using an English adjective describing the quality of the material he sells, to make that a trade-mark. In this case it is the word "Nourishing," which is in common use and thoroughly understood by all Her Majesty's subjects—"Nourishing Stout." Upon principle, ought this to be a trade-mark? What is the quality of stout? I suppose, if any one was called upon to describe the most distinguishing quality stout possesses in the opinion of the world, it would be that it is a nourishing beverage.

Now, it is undoubtedly settled, and I think most reasonably settled, by the rules of this Court, that a man with reference to his production, whether it be an article manufactured by him, or an article improved by him, or an article he buys of other people, is at liberty to adopt a trade-mark which shall distinguish it from the articles of all other people, which will become a mark of his own; and if it be sufficient to distinguish it, then he has a right to restrain all other persons from using that mark. The case has been very carefully and elaborately argued; and although I have only heard one side, it has occupied two days and a half. There is a great mass of evidence, which has been all gone into, although the great bulk of it is utterly useless. The cases which have been referred to go to this: If a man adopts a particular mark, he has a right to restrain all other persons from using that mark. But upon principle can it be said that if a man uses a word with regard to an article he sells (he not brewing the beer, but being the mere retailer of it, and selling it in certain quantities), he can call it his "Nourishing *London* Stout"?

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If I am right in saying that the particular quality of the stout is this nourishing quality, must not every man be at liberty to describe his stout, whether brewed by himself or brewed by another and sold by him, as being a nourishing beverage? Why are not Messrs. *Findlater & Co.* at liberty to say theirs is a nourishing stout as well as the Plaintiff's. Upon principle it appears to me there must be something to go beyond a mere English adjective describing the quality of the material. If you use a foreign word, or a word in a dead language not known to people in general, that word itself, because it is not understood, may very reasonably become a trade-mark. Therefore it was that, in the case of *McAndrew* v. *Bassett* (1), the word "*Anatolia*" was held to be a good trade-mark, although "*Anatolia*" describes a district of *Asia Minor;* but that was so utterly unknown to the great bulk of the community that it was not unreasonable to say that those who first used the word "*Anatolia*" and made it a trade-mark thereby acquired the exclusive right to use it. A passage in Lord *Westbury's* judgment in that case has been dwelt upon, in which he says (2): "It is urged on behalf of the Defendants this word *Anatolia* is a general expression; is, in point of fact, the geographical designation of a whole tract of country wherein liquorice root is largely grown, and is therefore a word common to all, and in it there can be no property. That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." That has been read as applying to any word whatever; but I understand Lord *Westbury* as applying those observations to the word before him, and I find nothing in his judgment in that case, or in what has fallen from him, or any other Judge in any other case, that would warrant the principle that a mere description of the quality of the article by an English word can become a trade-mark. That case

(1) 4 D. J. & S. 380. (2) 4 D. J. & S. 386.

was mainly relied on for this purpose: There the word was a foreign, unknown word, "*Anatolia*," but if the word selected had been an English word describing its quality, I am clear that those observations would have been as adverse to the Plaintiff's case as in the case of this foreign word they were favourable.

The next case is that of *Wotherspoon* v. *Currie* (1), the *Glenfield* Starch case. Now why was the word "*Glenfield*" a good trade-mark? *Glenfield*, if it was a known place, was a very insignificant one, although if it had been a known place it might, under certain circumstances, have become a good trade-mark; but, in fact, "*Glenfield*" was an unknown word. Nobody reading "*Glenfield*" knew whether it meant the name of the maker of the starch, or, in fact, what it meant. It turned out the original manufacturers had made their starch at a small place some few miles from *Glasgow* called *Glenfield*. It had acquired the name, and was a source of great profit to the Plaintiffs. Then the Defendant, for the purpose of giving a colour to his proceedings, went to the same place as that at which the Plaintiffs had originally manufactured their starch—the place called *Glenfield*—which had no definite known situation, and could not be found in the Directory; and in order to make it appear that his starch was the Plaintiffs', made the word *Glenfield* prominent on his labels instead of his own name. That therefore, again, was the trade-mark. It might have been a name, or anything else, but whether it was the one or the other, it was utterly unknown to the public, but it became a good trade-mark. I originally restrained the Defendant from using it, and my decision was afterwards affirmed by the House of Lords.

The next case relied on was *Ford* v. *Foster* (2), with regard to the Eureka shirts. There, again, the same principle applied. The trade-mark in that case was the word "Eureka." I need not say that that word is one which ninety-nine out of every hundred of Her Majesty's subjects would be wholly unacquainted with. Whether it was the name of a person or a place would to the public in general be perfectly unintelligible. The trade-mark of the Plaintiff had been the word "Eureka." Sometimes he had

(1) Law Rep. 5 H. L. 508. (2) Law Rep. 7 Ch. 611.

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called his shirts "*Ford's* Eureka Shirts," and sometimes "Eureka Shirts," without *Ford*. The Defendants called theirs "*Foster's* Eureka Shirts," but they used the word under circumstances which did not satisfy Vice-Chancellor *Bacon*, but which did satisfy the Court of Appeal, that it had been fraudulently used by the Defendants; and therefore, being a fanciful name, the Court of Appeal considered that the Plaintiff was entitled to the use of the word, although he had made false and fraudulent representations that he had a patent. That question does not arise here, and I need say no more upon it.

The next case referred to was that of *Broadhurst* v. *Barlow*, before Vice-Chancellor *Wickens* in the year 1872. In that case the article was longcloth manufactured for the Turkish market, and the trade-mark was the words "Exactly twelve yards" in the Turkish, Armenian, and modern Greek languages; as it went to the Turkish market it is possible that some persons would understand all the three languages, but although the Turks would understand the Turkish language, possibly the Armenians would not, and possibly the Turks would not understand the Armenian language, and probably neither would understand the modern Greek language. The trade-mark there consisted of the particular order in which those foreign words were used. Vice-Chancellor *Wickens* thought (and I am very much disposed to agree with him) that they did amount to a sufficient trade-mark. If the Plaintiffs had used the words "Exactly twelve yards" in the English language, nobody would have said that any other manufacturer could not have done the same; or that if one English manufacturer of ribbon had put on the roller "Exactly twelve yards," another manufacturer might not make his ribbon, and put it on a roller, and say "Exactly twelve yards." It would be trade-mark running mad to say that such a thing as that could be. Therefore the fact of its being put in three languages, all foreign languages, constituted the trade-mark in that case.

The next case was *Seixo* v. *Provezende* (1), which was with regard to Baron *Seixo's* port wine. That was a very remarkable case, because *Seixo* was a district in *Portugal* from which the Baron—the Plaintiff—derived his title. Therefore it was at once a name

(1) Law Rep. 1 Ch. 192. 12 Jur. (N.S.) 215.

and a district. In that case the Defendants also had a vineyard, or some vineyards, in the *Seixo* district. But *Seixo* was a name, and the Plaintiff was therefore entitled to use his own name, *Seixo;* although it is difficult to say if it had not been for particular circumstances that he would have been entitled to prevent the Defendants from calling their wine "*Seixo*," because their wine did come from the district of *Seixo*. The Plaintiff, however, was an individual bearing the name, and it was also the district from which he took his title; and there was no reason at all why the Defendant should be allowed to use precisely the same name. Lord *Cranworth* laid down very distinctly the rule of the Court in a manner which nobody could find fault with, and in language which I have myself frequently followed, namely, that no man is by the use of a word, a name, a device, or mark to deceive the public, and lead them to believe they are buying the articles of one man, while in truth they are buying the articles of another.

The next case relied upon was that of *Cocks* v. *Chandler* (1), the "*Reading* Sauce" case. "*Reading* Sauce" is an article of general use, and has become so much so that no person can restrain another from calling a sauce made at *Reading* "*Reading* Sauce." But the Defendant thought proper to call his sauce the "Original *Reading* Sauce." That was a representation to the public, as the Master of the Rolls put it, that he was the original vendor, and was in possession of the original receipt, or had some particular claim to the words "*Reading* Sauce" which others had not. That was not true. He was not the original vendor, nor did he represent the original inventor; and, therefore, he was restrained from the use of the word "original," because that part, and that part only, of his representation was untrue, and, consequently, fraudulent.

Nothing turned upon the next case of *Lawson* v. *Bank of London* (2), because it went off upon an informality in the declaration. That was a case where a man claimed that he had used the words "Bank of *London*." No doubt if he had called his place of business the "Bank of *London*" it was a matter of public inconvenience that another bank should be called by the same name; and

(1) Law Rep. 11 Eq. 446. (2) 18 C. B. 84.

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having once adopted that name, he might have applied to restrain the Defendants from using the same name, just as a newspaper proprietor who adopts a particular title might seek to restrain other people from using the same title. I have had one or two cases of that kind, one a country newspaper in *Buckinghamshire*, where one paper having been established some years, the Defendant set up a newspaper and called it by the same name, which was restrained; and I believe the order I made has been acquiesced in, and is now in force.

The next case which was relied upon was the case before me, and afterwards before the Court of Appeal, of *Lee* v. *Haley* (1), the *Guinea Coal Company* case. The principle I am acting upon in this case I acted upon there. In that case the trade-mark was the "Guinea Coal Company," that is the description of the quality of the coal, because the "Guinea Coal Company" meant a coal company which sold coals at a guinea a ton. My judgment, and the judgment of Lord Justice *Giffard*, who affirmed me, go upon the same principle, that the Defendant *Haley* was entitled to sell his coals as the "Guinea Coal Company," because he did sell coal at a guinea a ton; but nothing would satisfy him but going to *Pall Mall*, where the Plaintiff carried on business, and calling himself the "Guinea Coal Company, *Pall Mall*." That was calculated to deceive, and there was some evidence that it did deceive customers who were going to purchase coals from the Plaintiff. That was done, as I considered, for the purpose of deceiving the public, and I see Lord Justice *Giffard* expresses in the strongest terms that it was done deliberately for the purpose of depriving the Plaintiff's company of their just rights.

Knott v. *Morgan* (2) is a case of an exactly similar kind, about the omnibus company, where one omnibus company having adopted a particular title, another omnibus company were not permitted to adopt the same title, it being a name of trade which they are entitled to restrain anybody else from using.

There was also lately before me, and before the Court of Appeal, who affirmed my decision, the Annatto case (*Fullwood* v. *Fullwood*(3)). In that case the uncle, the Plaintiff, had got the original

(1) Law Rep. 5 Ch. 155. (2) 2 Keen, 213.

(3) See W.N. (1873) 93 & Ch. Ch. 185 [illegible]

business. The nephew, the Defendant, set up the same business, and used a label so like his uncle's that I had great difficulty in saying even on the label itself that there was not a case for interference. Upon the whole, I am inclined to think the Court would not have interfered upon the label alone, as his name was *Fullwood*, and he did make annatto, as long as he remained at a distance. At all events, the uncle did not ask for the interference of the Court on that ground; but nothing would do but that, like the Defendant in the *Guinea Coal Company* case, he must remove from the place where he had been carrying on his business into the same small street in which his uncle carried on his business. There, there being a combination of the name, a similarity of the labels, and the same place of manufacture, I thought, and in that I was affirmed by the Court of Appeal, that it was a case for the interference of the Court, because I was of opinion that he could not have removed into that street, of all streets in the world, except for the purpose of availing himself of the name and reputation of his uncle. All these cases seem to me to be distinguishable as proceeding on a totally different principle.

The case which does approach most nearly to this, and in which I think the views I am expressing are entirely borne out, is the case of *Braham* v. *Bustard* (1) with regard to the "Excelsior Soap." The facts were these: the Plaintiff had manufactured a white soft soap and called it "Excelsior White Soft Soap." The same principle applies here. I have already said that a fanciful word, not understood by the public, you may have the exclusive right to use, because it will become a trade-mark. "Excelsior" is a Latin word which would be understood by few of the public, and does not and could not describe quality. It is a fanciful word which the owner chooses to adopt. Then the Defendants called their soap also "Excelsior White Soft Soap." The Vice-Chancellor *Wood* in giving judgment said (2): "It is said that the name is a ridiculous one, and the Court will not interfere to protect it. But though it is true that the Court will not, if it can avoid it, be made the medium of a mere puffing advertisement, still if, as here, the Plaintiffs have a right of sufficient value to induce others to attempt a fraudulent violation of it, the Court will interfere to

(1) 1 H. & M. 447. (2) 1 H. & M. 455.

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prevent them from being cheated. Again, the Defendants urge that 'Excelsior' is merely a mark of quality, like 'superfine' or 'superior,' but there seems to me to be a double answer to this. In the first place, the Plaintiffs do not sell two or three qualities of soap, calling one of them 'Excelsior' and the others by some other name; they have only one quality, which they denominate 'The Excelsior White Soft Soap,' and there is nothing except itself with which to compare it. But, in the second place, the manner in which, as has been proved, this name is generally used in the market, shews that it is more like such names as '*Victoria*,' '*Albert*,' '*Eureka*,' &c., which are not names of quality, but simply arbitrary designations for the sake of distinction. If the Plaintiffs had issued their soap under the name of '*Albert* White Soft Soap,' I should undoubtedly have interfered to prevent any one else from adopting that name to their prejudice; and here it is proved that the Plaintiffs' goods had undisputed possession of the market for at least six months under the name at present in dispute, and have acquired a reputation under that name." I think the whole of that proceeded on the basis that if the word had been an English word describing quality, the word merely describing quality would not be the subject of a trade-mark. My opinion is, that, for the protection of the public, it is necessary a trade-mark should be something beyond a mere English word denoting quality. If the Plaintiff was desirous of possessing the advantage of his trade-mark he had the matter completely in his own hands, because in order to distinguish it from all others he might have associated his name with it, or the name of his predecessor, or something which would distinguish it from merely nourishing stout, which in my opinion any person has a right to call his stout, if it be that which it is said in the ordinary sense of the word to be—nourishing stout. The word "Nourishing" therefore of itself will not do. If the trade-mark of the Plaintiff is more than that, nothing can be more clear than that the Defendants have not imitated it. If his case is a colourable imitation of the label, such an imitation has not taken place. If he has only rested his case on the word "Nourishing," I am clearly of opinion that is no trade-mark, and on that ground I think his case wholly fails.

I am also of opinion, upon the evidence, that his stout is not known by the mere single name of "Nourishing Stout," but as "*Blockey's* Stout," "*Blockey's* Nourishing Stout," "*Raggett's* Stout," or "*Raggett's* Nourishing Stout." To shew the extent to which the Plaintiff has gone, I may mention that he has actually filed a bill against another man for calling his stout "Nourishing *Dublin* Stout." Now *Dublin* stout is as well known as *London* stout, and is a thing of great reputation. It is absurd to say that a man cannot call his stout "Nourishing *Dublin* Stout." The word "*Dublin*" completely distinguishes it from the Plaintiff's, as does also the character and form of the label. It shews the absurd lengths to which the Plaintiff goes. I can give no encouragement to a Plaintiff who sets up claims of this sort, and entirely fails. On these grounds I am of opinion that the bill must be dismissed.

Then comes the question of costs, and a very important one it is, considering the length to which this litigation has been carried. Now, a man who asserts a title of this sort must proceed on his own rights, and if it turns out that he files his bill asserting a right he has not, there must be something very special to exonerate him from his liability to pay the costs of the litigation in which he has so embarked. Are there such circumstances in this case? It seems that from a very early period the Defendants, who are admitted on all hands to be highly respectable traders, and have been so described emphatically by the Plaintiff's counsel, have carried on this business. Have they shewn an intention to commit a fraud? I am bound to say I do not believe the Defendants ever intended to do anything of the kind, or did it; and further, that if an application had been made to them they were ready to discontinue the use of the word "Nourishing." But that would not satisfy the Plaintiff, who seems to have been very lavish in his expenditure for the purpose of establishing his right to this word "Nourishing." No doubt if he could establish his right to it, and so exclude all the world, it would be very valuable to him. It is a speculation in which he has thought fit to embark, and in which he has failed. Nothing would do for him but to go on with his suit, and the motion was brought before me on false representations, because the representation in the bill originally filed is: "The manufacture of such stout is based upon a particular method or process, whereby

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the earthy phosphates or nutritive salts of the malt, which afford mineral nourishment to the bones and nerves of the body, are more fully and completely extracted and developed than is ordinarily the case." That is his deliberate statement, because he swears it also in his affidavit; but not only that, for he actually adheres to it at a later period, when he was cross-examined on the 5th of December, 1871. He now abandons all that case, and admits that *Truman, Hanbury, & Co.* supply him from the same vats from which they supply all their other customers, and that the beer for him leaves the brewery precisely in the same condition as it leaves the brewery for everybody else. What is his case now? Why, that when he gets it to his cellars he doctors it himself—that is, he puts something into it which brings out these remarkable qualities; that it becomes more agreeable to the palate, more digestible, and more suited to invalids, and has all those qualities which he wants to take advantage of under the word "Nourishing." For the purpose of proving that, he has brought forward half a dozen medical men, who have given testimony that they have tasted the beer when first delivered to the Plaintiff and after it has been doctored, and they could detect the difference merely by the taste. The Defendants have called a Dr. *Rogers,* who says he analyzed the beer and could find no difference between the two; and as the brewing solely for him by *Truman & Co.* turns out to be a fiction, I am very much inclined to think that what he puts into the beer is also a fiction. I cannot assume that there is any real difference.

It is, I think, very much against the Plaintiff that he launched his case with so false a statement as that the beer was brewed expressly for him, when he knew perfectly well that he received just the same stout as other people, and that, if there was a difference, it depended upon the doctoring it received from him after it got into his own cellars. That is not a circumstance tending to relieve the Plaintiff from payment of costs. It has been said that the conduct of the Defendants has been unreasonable; but has it been so? The Plaintiff files his bill upon an entirely false and fictitious case, but he persists in going on with the suit, and exacts an answer from the Defendants. By that answer they state that the use of the word "Nourishing" had been a very small advantage, if any,

to them; and although they believed and submitted that they had a perfect right to the use of the word "Nourishing," still, as they considered that the use of the word was not worth disputing about, and for the purpose of avoiding litigation, they would have given up the use of that word if a proper application had been made to them by the Plaintiff to do so. No such application had, however, been made, and they submitted that the whole question might and would have been settled amicably if the Plaintiff had not acted in the summary and arbitrary manner which he had adopted. I admit that that is not an unconditional offer to give up the use of the word, but it is holding out the olive branch and affording an opportunity of settling the whole matter. But the Plaintiff seems so possessed of what I cannot help calling a degree of pertinacity on the subject that he had the exclusive right to use the word, and that nobody, whether they described their stout as "*Dublin* Stout" or "*Exeter* Stout" or "*Manchester* Stout," could use the word "Nourishing" because he originally adopted that word, that when opportunity is given him to retire from the litigation, he persists in going on with it.

Therefore, as in my opinion he has totally failed in establishing a right to the use of the word "Nourishing," I am also of opinion, with regard to the mode in which he has conducted the litigation he is very much to blame; and therefore the bill must be dismissed with costs, including the costs of the motion which stood till the hearing.

Solicitors for Plaintiff: Messrs. *Baxter, Rose, & Norton.*
Solicitor for Defendants: Mr. *A. Dobie.*

V.-C. M.

1873

Nov. 17.

KITCHEN *v.* IBBETSON.

County Court Appeal—Goods of Intestate—Bankruptcy of Administratrix—Order and Disposition—Laches.

4 Ch D. 514
12 Ch D 425
13 Ch D 467

The holders for value of an unregistered bill of sale of certain goods supplied to an innkeeper for use in his business allowed them to remain in the hands of his administratrix after his death. She continued the business, and remained in possession of the goods for fifteen months after taking out letters of administration to him, at the end of which time she became bankrupt:—

Held, first, that the goods were in the order and disposition of the bankrupt with the consent of the true owners:

Secondly, that independently of the bill of sale the lapse of more than a year, during which the goods were in the hands of the administratrix and used by her for the purposes of her business, precluded any claim as against her creditors by the creditors of the estate of which she was administratrix.

THIS was an appeal from a decision of the Judge of the County Court at *Leeds*.

The Appellants were Plaintiffs in a creditor's suit instituted by plaint in the County Court on the 20th of January, 1872, for the administration of the estate of one *Edward Ibbetson*, an innkeeper at *Leeds*, against *Elizabeth Ibbetson*, his widow and administratrix. They claimed as creditors of the estate in respect of a sum of £109, being a balance due to them for goods supplied to *Edward Ibbetson* for use in his business, with interest thereon at the rate of 5 per cent. from the 1st of June, 1870. This debt was secured by a bill of sale on the goods dated the 31st of January, 1865, which had never been registered.

Edward Ibbetson died intestate on the 1st of October, 1870, and letters of administration were granted to *Elizabeth Ibbetson* on the 14th of November, 1870. She continued the business, and remained in possession of the goods comprised in the bill of sale till the 13th of January, 1872, when she filed a petition for liquidation in the same County Court, under the *Bankruptcy Act*, 1869. On the 1st of February, 1872, *John Mayall*, who was afterwards made a Defendant to the suit, was appointed a trustee of the estate, and as such took possession of the property comprised in

the bill of sale. The Appellants had taken no steps towards registration of the bill of sale, or towards taking possession under it.

The goods were sold in the bankruptcy and produced £93 13*s.* 3*d.* On the 21st of March, 1873, the County Court Judge, by the decree in the suit, made a declaration that this sum was applicable for the payment of Mrs. *Ibbetson's* creditors.

This part of the decree was now appealed from.

The appeal case, after stating the above facts, continued:—

"The questions for the opinion of the Vice-Chancellor are:—

"1. Whether the goods referred to in the said decree were at the time of the death of the said intestate subject to the aforesaid bill of sale to the Plaintiffs, and whether the same at the time of filing the petition by the administratrix were in her hands, as such administratrix, as part of the intestate's estate, and the proceeds thereof applicable for the payment of his debts, or whether such goods were at the time of petition of the said *Elizabeth Ibbetson* the property of the Plaintiffs by virtue of the bill of sale, and were in her order and disposition by their consent?"

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for the Appellants:—

The Appellants did not seek to enforce the bill of sale by their plaint, but sued simply as creditors of the intestate.

The necessary conclusion from the decision now appealed from is, that an executor or administrator may, by retaining in his hands part of the estate he represents, make it assets for payment of his own debts. But it is well settled that trust property in the hands of a bankrupt is not assets for payment of his debts as being in his order and disposition, and a personal representative is a trustee for this purpose. This possession being in *autre droit* is not such as gives his creditors any title: *In re Thomas* (1); *Ex parte Marsh* (2).

It is only in the case of an executor *de son tort* that any such right arises, and this was the position of the parties in *Fox* v. *Fisher* (3). The distinction between this case and that of a legal personal representative clearly appears by such a case as *Stocken* v. *Dawson* (4).

(1) 1 Ph. 159.
(2) 1 Atk. 158.
(3) 3 B. & A. 135.
(4) 9 Beav. 239.

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The proper course in this case would have been to appoint a receiver of so much as was in the hands of the bankrupt as administratrix: *Ex parte Ellis* (1).

Mr. *G. Williamson* (Mr. *Glasse*, Q.C., with him), for the trustee in the bankruptcy:—

The question is simply one of fact, whether, under the circumstances, the goods must not be treated as having become the property of the bankrupt in her own right. The rule of law is, that where creditors have allowed time to elapse without taking any steps to get in the estate of their debtor, they will not be alllowed, as against the creditors of his representative, to claim property which has been left in the possession of the representative: *Fox* v. *Fisher* (2). This principle applies to the case of a legal personal representative as well as representative by wrong: *Ray* v. *Ray* (3). Then the only question is, whether a sufficient time has elapsed in this case to give a preferable title to the creditors of the administratrix. It is an important consideration that the assets are very small, and that the Appellants took no steps to get them in till after the petition in bankruptcy was presented.

Moreover, the Appellants were, under the bill of sale, the true owners of the goods, and the administratrix remained in possession with their consent.

Mr. *Barber*, in reply:—

The smallness of the assets is rather a justification for delay than otherwise.

The real point is, that this is trust property, and cannot be considered as in the order and disposition of the bankrupt. The bill of sale cannot be set up to defeat the rights of the creditors of the intestate.

SIR R. MALINS, V.C.:—

This is an appeal from a decision of Mr. *Marshall*, the Judge of

(1) 1 Atk. 101. (2) 3 B. & A. 135.
(3) Coop. G. 264.

the County Court at *Leeds*. The amount of money in question is small, but the principles involved are important.

[His Honour then stated the facts above mentioned, and continued:—]

No doubt, as a general rule, trust property does not pass to a trustee in bankruptcy, because it is not property which can be in the order and disposition of the bankrupt with the consent of the true owner, and therefore, even where it continues to be held by the bankrupt till the time of the bankruptcy, it does not form part of the estate divisible amongst his creditors.

But this case depends upon its particular circumstances. Mrs. *Ibbetson* was, no doubt, in the first instance, a trustee of this property as administratrix of her husband, and was in possession in that character. But when she carried on the business herself, she did so on her own account. It is clear that as regards the business she dismissed the character of administratrix, and continued on her own account. But the question of the ownership of these goods still remains.

Now, in the first place, I think the Plaintiffs had a good assignment of the property by their bill of sale, and that the fact of it not being registered does not make it void against the legal personal representative. Therefore, under the bill of sale, I think they had a good title. But then they did not take possession. The goods consequently remained in the order and disposition of the bankrupt with the consent of the true owners.

But if I dismiss from consideration their title under the bill of sale, the Plaintiffs were creditors of the intestate at his death, and as such had a right to take possession of the property. They, however, took no steps with that view, but, on the contrary, allowed the administratrix to remain in possession. She was, consequently, in possession with their consent. Then the question is, how long the creditors could allow that state of things to continue without affecting their rights. If they might do so for twelve months, why not for her whole life? That would be most unfair, for it would leave persons who knew nothing about the husband to continue dealing with her, under the inpression that these goods were her property, and then to find that they had nothing to resort to for payment of their debts.

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The decided cases, however, negative such a proposition. In *Fox* v. *Fisher* (1) it was held that possession of the goods of an intestate for several years by a party who made himself executor *de son tort* gave his assignees, upon his afterwards becoming bankrupt, a preferable title to that of a creditor of the intestate; and *Ray* v. *Ray* (2) shews that this doctrine extends to the case of a legal personal representative.

On both these grounds, therefore, I am of opinion that the appeal must be dismissed with costs.

Solicitors: Messrs. *Ridsdale, Craddock, & Ridsdale;* Messrs. *Williamson, Hill, & Co.*

V.-C. M. 1873 *Nov.* 15.

WHYTE *v.* WHYTE.

[1872 W. 238.]

Legacies to the same Person by different Instruments—Substitutional, not Cumulative.

A testator gave two legacies of £5000 each to the same person by two codicils executed at the same time, and in nearly the same words, neither codicil comprising any other legacy. One instrument he sent to his solicitor and the other he sent to the legatee. Three years afterwards he withdrew the codicil held by his solicitor and sent it also to the legatee. He had previously executed his will in duplicate, sending one copy to his solicitor and the other to the principal beneficiary:—

Held, that the legacies given by the two codicils were substitutional and not cumulative.

SIR *JOHN HENNIKER*, late of *Compton Martin*, *Somerset*, by his will, dated the 7th of February, 1860, gave certain property to trustees for the benefit of *Anna Maria Whyte* and her two children.

The testator made a codicil to his will dated the 2nd of April, 1868, written by himself upon a sheet of note paper, which was in the following words:—"I give and bequeath to *Eliza Dymocke*, now residing at *Compton Martin*, the sum of £5000, to take and receive

(1) 3 B. & A. 135. (2) Coop. G. 264.

for her own use during her life the interests or dividends thereof, and from and after her decease the interests and dividends thereof are to be paid amongst her children, *Frederick*, *Margaret*, and *George*, during their lives respectively, as she, the said *Eliza Dymocke*, shall by any deed or instrument in writing or by her last will or testament direct or appoint. And after the deaths of them, the said *George*, *Margaret*, and *Frederick*, the said principal sum of £5000 is to be distributed amongst the issue lawfully begotten of the said *George*, *Margaret*, and *Frederick* respectively, in such shares and proportions and on such conditions as the said *Eliza Dymocke*, by any deed or instrument in writing or by her last will and testament appoint, and in default of such appointments I direct that the interest and dividends of the said sum of £5000 shall be equally divided amongst the said *George*, *Margaret* and *Frederick* for life, and after their deaths respectively the principal in parts or shares shall go to their lawful issue *per stirps;* and in case of total failure of such issue I direct that the said principal sum of £5000 shall revert to the Lord or Lady of *Compton Martin* aforesaid at the time of the failure of such total issue as aforesaid."

The testator made another codicil, also bearing date the 2nd of April, 1868, and written in the same manner, in the following words:—"I give and bequeath to *Eliza Dymocke*, now residing at *Compton Martin*, the sum of £5000 sterling, in order that she may take and receive for her own use during her life the interest or dividends thereof, and from and after her death I direct that the interests and dividends thereof are to be paid and distributed amongst her children, viz., *George*, *Margaret*, and *Frederick*, during their lives respectively, in such shares and proportions as she, the said *Eliza Dymocke*, shall by any deed or instrument in writing or by her last will or testament direct; and that after the deaths of them, the said *George*, *Margaret*, and *Frederick* respectively, such share or proportion of the said sum of £5000 is to be given and distributed amongst the issue lawfully begotten of the said *George*, *Margaret*, and *Frederick*, and on such condition as the said *Eliza Dymocke* shall by any deed or instrument in writing, or by her last will and testament, appoint; and in default of such appointment respectively, I direct that the interest or dividends of the said

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sum of £5000 shall, after the decease of the said *Eliza Dymocke*, be equally divided amongst the said *George*, *Margaret*, and *Frederick*, for their respective lives, and after their deaths respectively the said principal sum of £5000 shall go in equal parts or shares to their lawful issue *per stirpes;* and in case of total failure of all such issue, I direct that after the deaths of them, the said *George*, *Margaret*, and *Frederick*, the said principal sum of £5000 shall revert to the Lord or Lady of the *Compton Martin Manor*, of *Compton Martin* aforesaid, being so at the time of the total failure of such issue as aforesaid. I further direct that, immediately on my death, so much of any Government Stock as I may be possessed of as may be equivalent to £5000 sterling shall be transferred to two or more trustees for the purposes aforesaid, so that £5000 worth sterling of Government Stock may always be held by the said trustees for the purposes aforesaid." These two codicils were executed at the same time, and in the presence of and attested by the same witnesses.

The testator made a further codicil to his will, dated the 21st of September, 1869, in these words: "Whereas, by a codicil dated on or about the 7th day of November, 1867, I made certain alterations in the disposition of my estate mentioned in my will: Now, I hereby revoke the said codicil, and I also revoke another codicil made in or about the year 1869, whereby I gave the sum of £10,000 to *George A. J. C. Whyte*, therein and in my said will mentioned. And in all other respects I confirm my said will dated the 7th of February, 1860, except so far as the same is altered by a codicil thereto dated the 2nd of April, 1868, which last-mentioned codicil I hereby confirm."

After the death of the testator, which took place on the 8th of August, 1872, the said will and three codicils were proved in the Probate Court by *Anna Maria Whyte*, the sole surviving executrix of the testator.

The bill was filed for the administration of the testator's estate, and the question now argued was whether *Eliza Dymocke* and her three children were entitled, by virtue of the two codicils respectively dated the 2nd of April, 1868, to two legacies of £5000 each, or whether they were entitled to one legacy of £5000 only.

It appeared upon the evidence that, upon the execution of his

will in duplicate in 1860, the testator had sent one copy thereof to his solicitor, and the other copy he had sent to Mrs. *Whyte*.

It also appeared that he had forwarded the two codicils of the 2nd of April, 1868, on the day of their execution, one to his solicitor and the other to Mrs. *Dymocke*, and that in the year 1871 he had obtained from his solicitor the codicil which he had sent to him, and had sent it to Mrs. *Dymocke*, so that upon the death of the testator she was in possession of both those codicils.

Mr. *Glasse*, Q.C., and Mr. *Freeman*, for the Plaintiff, who was tenant for life of the residue:—

We contend that Mrs. *Dymocke* and her children, the legatees under the two codicils of the 2nd of April, 1868, are entitled to one legacy only of £5000. There can be no doubt what the intention of the testator was. When he made his will, giving property to Mrs. *White* and her children, he executed it in duplicate, and sent one copy to his solicitor and the other to the lady who was to benefit by the will. Then, when he made his codicil, he took exactly the same course; he made two instruments, by each of which he gave £5000 to Mrs. *Dymocke* and her children, and he sent one codicil to his solicitor and the other to Mrs. *Dymocke*. Both codicils were written on sheets of note-paper by the testator himself, who was evidently well acquainted with legal phraseology. The difference in words is only such as a person might be supposed to make in copying any other instrument, thinking, no doubt, that a slight variation in expression would be of no consequence. The effect of both codicils is precisely the same, but in one of them he adds the clause directing that a sum of money should be set apart out of his government stock to answer the amount of the legacy. Then, having copied as nearly as might be the previous codicil, he called in the two witnesses, who both of them witnessed the execution of the two codicils at one and the same time. They were both sealed by the same seal and both sent on the same day, one to his solicitor and one to Mrs. *Dymocke*. They are to all intents and purposes one and the same instrument, intended, like the will, to be executed in duplicate, and consequently the legatees can only be entitled to one legacy of £5000.

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Mr. *Pearson*, Q.C., and Mr. *Rigby*, for persons in the same interest.

Mr. *Cotton*, Q.C., and Mr. *Rowcliffe*, for Mrs. *Dymocke*:—

The rule of law is, that where a testator gives two legacies to the same person by different instruments, whether the legacies be more, less, or equal, those gifts are cumulative. This was laid down in *Hooley* v. *Hatton* (1), in *Ridges* v. *Morrison* (2), and in *Lee* v. *Pain* (3). The rule was followed in *Wilson* v. *O'Leary* (4). There a testator by codicil gave legacies of various amounts to nine legatees, and afterwards made a second codicil, which was substantially a copy of the former, except as to several legatees whose position or circumstances were altered; and the Court of Appeal, in affirming the decision of Vice-Chancellor *Bacon*, held that the case was not taken out of the general rule that the gift of a legacy by a subsequent instrument to a person who takes a legacy under an earlier instrument is cumulative and not substitutionary.

The explanation we give of the conduct of the testator is that he had not made up his mind when he executed his two codicils whether he should give £5000 or £10,000 to Mrs. *Dymocke* and her children, and consequently he sent her one codicil and kept the other back under his own control, in order that he might not hurt her feelings by shewing that he had thought fit to reduce the amount. He then determined that the legacy should be £10,000, and he withdrew the second codicil from his solicitor and sent it three years after it was executed, to the legatee. There is no other way of accounting for his conduct in sending the second codicil so long after the first. He acted differently with regard to his will, which was executed in duplicate, for there he only gave one copy to Mrs. *Whyte*, and the other remained in the custody of his solicitor at the time of his death.

Mr. *Glasse*, in reply:—

I have no case precisely of that nature, but I can go further than that, and shew that legacies given to the same person by

(1) 1 Bro. C. C. 390, n.
(2) Ibid. 389.
(3) 4 Hare, 201.
(4) Law Rep. 7 Ch. 448.

different instruments executed at different periods, and comprising other legacies, have been held to be substitutional.

In *Coote* v. *Boyd* (1), where two codicils were executed at different periods, one of which contained a legacy to another person, it was held that the legacies were not cumulative. In *Fraser* v. *Byng* (2) equal sums were given to the same person by a will and codicil, and it was decided, from the character and objects of the codicil, that the legacies were substitutional and not cumulative, although the legacy given by the codicil was only conditional; and in *Barclay* v. *Wainwright* (3) it was held that the rule as to legacies given to the same person by different instruments, being cumulative, might be repelled by evidence and the circumstance that all the legatees in the first instrument were legatees in the second, except those who were dead or had quitted the testator's service. A similar decision was given in *Russell* v. *Dickson* (4), in which it was held that circumstances might be adduced to rebut the presumption that the testator intended the legacies to be cumulative.

Here we say that the circumstances of the case fully prove the testator's intention that the legacies should not be cumulative.

In the cases cited the instruments were executed at different times, and there was nothing in the circumstances to shew an intention that they should be substitutional.

SIR R. MALINS, V.C.:—

The question I have to decide here is whether the testator has given to *Eliza Dymocke* and her children two legacies of £5000, or one legacy of £5000 only.

The case is a very singular one, although the facts are very simple. The testator, a gentleman of position in life, and of considerable fortune, made his will in 1860, giving his residuary estate to Mrs. *Whyte*, the mother of the Plaintiff, and it is proved by the evidence of Mr. *Kingsford*, who was his solicitor, that on that occasion the will was executed in duplicate, one copy being left with the solicitor who prepared it, and the other lodged with the residuary legatee. It is plain that this was done in order to shew the lady that he had made a provision for her, as she could not

(1) 2 Bro. C. C. 521.
(2) 1 Russ. & My. 90.
(3) 3 Ves. 462.
(4) 4 H. L. C. 293.

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take any part of his property except under a will. Between 1860 and 1868 he had made some provisions for Mrs. *Dymocke*, and he was always increasing and adding to those provisions.

But the question arises now under two documents executed on the 2nd of April, 1868, on which day, in his own handwriting, he made a codicil, or, as Mrs. *Dymocke's* counsel say, two codicils, to his will. Certain it is that he drew out two instruments on that day, the effect of which was precisely the same, although they are not exactly in the same words. The result of each instrument is to give Mrs. *Dymocke* £5000 for life, with remainder to her three children, naming them, with remainder over to the lady of the manor of *Compton Martin*. One of these instruments contains the addition of a direction that the £5000 shall be invested in the Funds. No one can possibly tell which was executed first and which last. Having prepared these two instruments in his own handwriting, the evidence of the two attesting witnesses who were his servants shews that he called them in to attest the execution of a codicil to his will. Their statement is "a codicil," and the testator thereupon executed in the presence of both witnesses two documents, which were the two codicils dated the 2nd of April, 1868, and both of the witnesses at his request subscribed the same. The testator made no observation at that time, or at any other time, with reference thereto, and the witnesses had never on any other occasion witnessed or attested the execution by the testator of any will, codicil, or other document.

It is not shewn at what time of day this took place—whether before or after post time—but on the 4th of April Mrs. *Dymocke* states that she received by the post one of those documents. She was then in *Somersetshire* and the testator was in *London*, and it came to her in a registered letter addressed to her son *George Dymocke*, with a letter to her in these words: "I enclose you a paper, sealed up, of which you must take particular care, as it is for your benefit." Then, on the 3rd of April—that is, the day after he had executed these documents—he sends or takes to Mr. *Kingsford*, his solicitor, the other copy, writing on it, "Codicil to my will;" and it is noted by Mr. *Kingsford* the day he received it, "Received from Sir *John Henniker*, Bart., 3rd of April, 1868." It is clear, therefore, that the testator must have posted the codicil for Mrs. *Dymocke* on the same day the copy of it was

received by Mr. *Kingsford*, and Mrs. *Dymocke* received it in the course of post on the 4th of April.

As matters stood at that time, what was the intention of the testator? The intention of course I cannot collect from any extraneous evidence. I think I am at liberty to receive evidence to shew what the testator did, but not to shew what he intended; and I am at liberty to receive evidence to shew what he did on the execution of these instruments, and I do not think the evidence of what he did is by any means immaterial. One sees at once why it was he executed two codicils. When he executed the will on the 7th of February, 1860, he placed it in the hands of Mrs. *Whyte*, to satisfy her that he had made a provision for her. Upon the same principle, when he executes this codicil in 1868, actuated by the same desire, he puts it in the hands of Mrs. *Dymocke*, to satisfy her he had made a provision for her also.

A great number of cases have been cited, but I apprehend they all proceed on the same principle. The rule of law is clear. All the cases cited—equally those lately decided as those decided a century ago—go upon this principle, that where there are separate instruments giving legacies to the same person, the *primâ facie* presumption is that, being by different instruments, different legacies are given. As Lord *Cranworth* very well expressed it, If the testator makes two instruments, he must be presumed to have intended to give twice. That is the *primâ facie* presumption. But that *primâ facie* presumption is liable to be rebutted; and the cases are innumerable, many of which have been cited, in which, by the internal evidence of the instruments themselves, looking at all the surrounding circumstances, the Court has arrived at the conclusion that double or cumulative legacies could not be intended. In the present case I have invited the counsel to supply me with the name of any case in which it has ever been decided that legacies given by two instruments, executed at identically the same time, have ever been held to be cumulative.

Now, what are the probabilities? The testator executed two instruments at the same time, containing a legacy of precisely the same amount, to the same individual—because that is admitted here on all sides, and I take it it is just the same as if it had been given to Mrs. *Dymocke* absolutely—the testator gave £5000 in each of these instruments to Mrs. *Dymocke;* if his object had been

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to give £10,000, he could have saved himself trouble by making one instrument, and giving £10,000. Mr. *Cotton* very ingeniously suggested that one of the motives which might have actuated him was this: that if he gave her two legacies of £5000, and then subsequently altered his mind, he might throw one codicil behind the fire, and thereby not hurt her feelings by shewing that his feelings and affections had diminished when he lessened the amount of the legacy. That is a very ingenious suggestion; but I think it is far too subtle for me to act on. Therefore, as a general rule, I should presume that when a testator executes at the same time two codicils, as he did here, giving to the same person, or the same set of persons, legacies of precisely the same amount—it might have been different if the amount had been different, because then I think there might have been a presumption that he intended both—but giving legacies of precisely the same amount to the same persons, I think the presumption is, and the transaction itself shews, that it was not his intention to give cumulative or different legacies, but that his object must have been to execute the instrument in duplicate, so that if one should be lost the other should be forthcoming. That, I think, in this case is distinctly shewn to have been his object by what he did, namely, sending one to the lady, the legatee, and the other to his solicitor for safe preservation. If, therefore, it is possible to arrive at a conclusion that not cumulation but repetition was the object, I am clearly of opinion that it was repetition, that is, that it was the same legacy, and that the two instruments were to have, not a different, but the same operation. In fact, it was an execution in duplicate only for the object to which I have already referred.

If the matter had stood upon the transaction of the 2nd of April, 1868, that is the conclusion at which I should have arrived; and in coming to that conclusion I think I am acting in perfect accordance with all the authorities that have been cited, both those cited by Mr. *Glasse* in his reply and those which Mr. *Cotton* relied upon: *Coote* v. *Boyd* (1), *Ridges* v. *Morrison* (2), *Lee* v. *Pain* (3), *Fraser* v. *Byng* (4), *Barclay* v. *Wainwright* (5), and *Russell* v. *Dickson* (6). They all proceed on the same principle, that the legacies

(1) 2 Bro. C. C. 521.
(2) 1 Ibid. 389.
(3) 4 Hare, 201.
(4) 1 Russ. & My. 90.
(5) 3 Ves. 462.
(6) 4 H. L. C. 293.

must be considered as cumulative *primâ facie;* but the internal contents of the instruments, or circumstances, may rebut that *primâ facie* intention, and shew that cumulation was not intended, but mere repetition. But I think in the present case I am relieved from all difficulty, because matters did not stop there. This being the 2nd of April, 1868, the testator subsequently executed another codicil in the month of September, 1869, nearly a year and a half after the codicil in question, whereby he revoked a codicil dated the 7th of November, 1867, and he also revoked another codicil made in the year 1869, and then follows the passage which is alone material, "And in all other respects I confirm my said will dated the 7th of February, 1860, except so far as the same is altered by a codicil thereto dated the 2nd of April, 1868, which last-mentioned codicil I hereby confirm." Mr. *Cotton* has suggested that although he said "codicil" he might have meant "codicils." I am bound to take the words of the testator, and to presume that every testator knows exactly the words he has used. I cannot attend to the suggestion that he did not observe the difference between "codicil" and "codicils." If at the time he executed the codicil of September, 1869, he thought he had made two codicils of April, 1868, by each of which he had given this lady £5000, he would have said, "except so far as the will is altered by two codicils thereto dated the 2nd of April, 1868, which last-mentioned codicils I hereby confirm." If I were at liberty to go out of the contents of the instrument itself, which it is not necessary to do, it is proved by Mr. *Kingsford* that this codicil was engrossed in his office. I have here the two documents produced from the Court of Probate. Mr. *Kingsford* proves that it was engrossed in the usual way in his office, and that those words were added by him at the testator's dictation. The testator seems to have been a man not deficient of capacity in these matters, for whether it is one codicil or two codicils which he executed on the 2nd of April, they would not do any discredit to a member of the legal profession, for he has very well created a life estate with remainder to three children, with a gift over by way of executory bequest. At all events, he was a man perfectly cognisant of what he was about, and when he dictated to Mr. *Kingsford* the words of the codicil, "except so far as the same is altered by a codicil thereto," I am bound to say

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that if it had stood on that parol evidence I must have come to the conclusion that he meant "codicil" and not "codicils." I do not advert to that as influencing my judgment at all, but only as shewing that the words contained in the instrument were the real words of the testator, and that he deliberately intended to state by this that he had executed one codicil to his will, and that one codicil, and one codicil only, he confirms. Therefore, if I take it as a matter of intention, I am perfectly satisfied that the intention of the testator was to give one legacy only. I come to the conclusion, however, upon the internal contents of the instruments, that that was his intention, and I am corroborated in that by all that took place and all the surrounding circumstances.

There is one more circumstance only to which I have to advert, and which is certainly rather inexplicable, and I confess I have not heard any good reason for what the testator did. Having in April, 1868, placed this codicil in the hands of Mr. *Kingsford*, who had been his solicitor for thirty years, he seems to have taken it out of his hands, which he had perfect liberty to do, whether for the purpose of destruction or anything else I do not know, but in the year 1871 he put the second copy of this codicil into the hands of Mrs. *Dymocke*. He also obtained from Mr. *Kingsford* the duplicate copy of his will. He returned the will to Mr. *Kingsford*, but he put this codicil into the hands of Mrs. *Dymocke*, who had already got one codicil; why he did that I do not know, but it cannot have any operation, because I must determine the question before me upon what took place in 1868 as interpreted by the testator in the codicil of 1869. Nothing he did after that altered the testamentary disposition he had made; and therefore, if I am right in my conclusion that the effect of what he did on the 2nd of April, 1868, as declared by himself in the codicil of the 21st of September, 1869, was to give one legacy only, it is perfectly clear that nothing that he did afterwards could give another legacy; and upon every ground I come to the conclusion that one legacy only was intended to be given by the testator.

Solicitors for the Plaintiff: Messrs. *Kingsford & Dorman.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle.*

Ex parte JEFFERY. *In re* HAWES.

C. J. B. 1873 Nov. 10.

Bankruptcy pending Liquidation Proceedings—Costs of Liquidation Petition—Adjudication made after the Creditors have refused to agree to Liquidation or Composition—Bankruptcy Rules, 1870, *r.* 292.

On the 31st of January a debtor filed a liquidation petition. On the 28th of February the first meeting of the creditors was held, when the creditors refused to pass any resolution in favour of liquidation or composition. On the 1st of March the debtor filed a declaration of insolvency, and the same day a creditor filed a bankruptcy petition founded upon the declaration, and the debtor was adjudicated a bankrupt. The trustee refused to pay the costs of the liquidation petition out of the estate :—

Held (reversing the decision of the County Court Judge), that the liquidation proceedings were, within the meaning of the *Bankruptcy Rules*, 1870, r. 292, pending when the bankruptcy took place, and that the costs of the petition ought to be paid out of the estate of the bankrupt.

THIS was an appeal from a decision of the Judge of the County Court at *Oxford*.

H. M. Hawes, a wine and spirit merchant at *Abingdon*, on the 31st of January, 1873, filed a liquidation petition, under which a receiver of his property was appointed. The first meeting of the creditors was held on the 28th of February, when the creditors present declined to pass any resolution in favour of liquidation by arrangement or composition. The debtor, on the 1st of March, filed a declaration of insolvency, and he was adjudicated a bankrupt on the petition of a creditor, the act of bankruptcy alleged being the filing of the declaration.

Mr. *Jeffery*, the debtor's solicitor, applied to the trustee under the bankruptcy for payment of the costs of the liquidation petition out of the bankrupt's estate. The trustee refused, and application was then made by Mr. *Jeffery* to the County Court for an order that the costs should be paid. The Judge dismissed the application, and Mr. *Jeffery* appealed.

By the debtor's affidavit in support of the application, it appeared that, on the 1st of November, 1872, he executed a bill of sale of his goods, furniture, stock-in-trade, and other effects, to

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Messrs. *Lemon Hart & Son*, who were large creditors, to secure £450 and further advances. They afterwards entered into some arrangement with the creditors of *Hawes*, that they should realize the estate and pay the creditors 6*s.* 8*d.* in the pound. *Lemon Hart & Son* took possession of the debtor's estate, and realized some of it. Ultimately the debtor, finding, as he alleged, that his estate was being improperly dealt with, consulted his solicitor, and under his advice filed the liquidation petition. He deposed that he took this step *bonâ fide* for the protection of the creditors. The evidence on the part of the trustee, who was a person in the employment of *Lemon Hart & Son*, denied that they had dealt improperly with the estate, or that they had procured any advantage to themselves. On the contrary, it was asserted that they would be losers by means of the payments they had already made to some of the other creditors. The trustee's solicitor also deposed that, in his belief, the liquidation petition was filed by the debtor's solicitor, who was his brother-in-law, for the mere purpose of running up costs, and taking the estate from the creditors. After the adjudication of bankruptcy the creditors passed a resolution approving of what had been done by *Lemon Hart & Son* before the presentation of the liquidation petition.

Mr. *Finlay Knight*, for the Appellant:—

This case falls within rule 292 (1); *Ex parte Page* (2); *Ex parte Mylne* (3); and the evidence shews no reason why the Court should order the costs not to be paid out of the estate.

Mr. *De Gex*, Q.C., and Mr. *Bond Coxe*, for the trustee:—

Rule 292 does not apply, for the liquidation proceedings were not pending when the bankruptcy occurred. After the creditors had determined to pass no resolution, a second first meeting could

(1) Rule 292 provides: "Where bankruptcy occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings shall be paid by the trustee under the bankruptcy out of the debtor's estate, unless the Court shall otherwise order."

(2) 25 L. T. (N.S.) 716.

(3) *Roche* and *Hazlitt's* Bankruptcy Practice, 2nd Ed. 493.

not have been directed: *Ex parte Cobb* (1). The whole thing had then fallen through. *Ex parte Page* (2) is distinguishable, because there the bankruptcy was founded upon the act of bankruptcy committed by the filing of the liquidation petition, which was not the case here. In *Ex parte Mylne* (3) the fair inference from the report is, that the creditors agreed that bankruptcy was the best course to be taken. Here the evidence shews that the creditors wished the estate to be realized under the arrangement with *Lemon Hart & Son*, and it is plain that the liquidation petition was filed vexatiously.

SIR JAMES BACON, C.J.:—

This case is one of great importance, for the circumstances are probably of frequent occurrence. Rule 292 is plain. The costs of the liquidation petition are to be paid out of the debtor's estate, unless some reason exists to the contrary. There might be cases in which there had been fraud in the institution of the proceedings, and then the Court would refuse to give the costs. In this case improper motives are imputed to the debtor, but I cannot find any trace of them. The imputation ought not to have been made; there is no foundation for it. Having regard to the fact that *Hart & Son* had power to deal with the property as they thought fit, I think it was the duty of the debtor to proceed as he did. I do not see what motive he could have had for filing the petition, unless it was to preserve his property for the general body of his creditors. It is true that the creditors declined to have a liquidation, and bankruptcy ensued. The moment, however, the debtor had signed the liquidation petition a receiver was appointed, and properly so, for one creditor had possession of the property without having any right to it. The officer of the Court stepped in for the benefit of all the creditors. The creditors subsequently approved the conduct of *Hart & Son*, but that can have no bearing upon the question before me. Unless a corrupt and fraudulent motive for presenting the petition can be proved, the costs of it must be paid. Here the liquidation proceedings might have gone on with the same effect

(1) Law Rep. 8 Ch. 727.
(2) 25 L. T. (N.S.) 716.
(3) *Roche* and *Hazlitt's* Bankruptcy Practice, 2nd Ed. 493.

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as a bankruptcy, and without any additional expense. I think the case comes clearly within rule 292 and the authorities cited to me. The order of the County Court must therefore be discharged, with the costs in that Court, and the trustee must pay out of the estate the costs of the liquidation petition.

Solicitors for the Appellant: Messrs. *Phelps & Sidgwick*, agents for Mr. *Jeffery, Oxford.*

Solicitor for the Trustee: Mr. *C. Mallam*, agent for Messrs. *T. & G. Mallam, Oxford.*

SIDNEY *v.* SIDNEY.

M. R.
1873
Nov. 11.

[1871 S. 140.]

Will—Release of Interest on Specific Sum—Ademption—Republication by Codicil—Wills Act (1 *Vict. c.* 26), *ss.* 24, 34.

Testator by his will, after reciting that there was due to him from his son the sum of £1440 or thereabouts, secured to him by bills or notes, or otherwise, released his son from payment of any interest up to the time of his death, and directed that he should have time for payment of the principal by instalments. Some years after he made a codicil not containing any reference to the aforesaid release. At the date of the will the son was indebted to his father in the sum of £1400, and between the dates of the will and codicil that sum was paid off and a subsequent advance of £1291 was made to the son by the testator, which was owing at the time of his death:—

Held, that the release of interest was equivalent to a specific legacy of the interest on the debt due at the date of the will; that the legacy had been adeemed, and that the release did not extend to the interest on the subsequent debt due at the date of the codicil.

WILLIAM SIDNEY, the testator in the cause, by his will, dated the 20th of February, 1860, made the following provision:—

"Whereas there is also due to me from my eldest son the aggregate sum of £1440 or thereabouts, secured to me by bills or notes, or otherwise. I do hereby release my said son from the payment of any interest up to the time of my death. And I direct that he shall have time for payment of the said sum of £1440 or thereabouts by paying one-sixth thereof in every year next after my death, so that the same will be payable over a period of six years by equal yearly payments."

The testator executed two codicils to his will, dated respectively the 28th of February, 1870, and the 14th of May, 1870, which did not contain any reference to the said direction as to his son's debt or the interest thereon. He died on the 25th of November, 1870. At the date of his will the testator's son was indebted to him in respect of various advances amounting to about £1400, which, it was admitted, represented the sum referred to in the will, and the repayment whereof was secured by promissory notes or acceptances.

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The sums thus due to the testator at the date of the will were all paid off, and the testator subsequently made to his son other advances, which at the date of the second codicil and at the time of his death amounted to £1291, of which £930 was secured by promissory notes, and £361 was unsecured.

The suit was instituted by the son against his father's executors, and prayed a declaration that under the provisions of the will, as confirmed by the codicils, the Plaintiff was wholly released from the payment of any interest up to the time of the testator's death on the amount owing at the testator's death to the testator's estate from the Plaintiff for principal, on any bills, notes, or otherwise, and also was entitled to time for the payment of such amount by instalments. The bill also prayed an injunction to restrain an action by the executors to recover the amount in question.

The question in the case was, whether the will operated only as a release of the interest on the specific sum then due, or whether, that sum having been paid off, it released the interest on all sums due from the son to the father at the date of the second codicil and at the time of his death.

Mr. *Southgate*, Q.C., and Mr. *J. W. Chitty*, for the Plaintiff:—

This will was republished by the last codicil, and, under sect. 34 of the *Wills Act*, the effect of its republication, as regards the operation of the clause in question, was the same as if the testator had, on the 14th of May, 1870, made a will in the words of the will so republished: *Winter* v. *Winter* (1); *In re Goods of Lady Truro* (2); *Anderson* v. *Anderson* (3); *Doe* v. *Walker* (4).

The question is, whether the testator meant a specific thing when he used the words "Whereas there is due to me from my eldest son the aggregate sum of £1440 or thereabouts, secured to me by bills or notes, or otherwise," and then released his son from the payment of interest up to the time. We contend that these words are not sufficiently definite to fix the exact amount, and that they would be applicable to the amount due at the date of the codicil, and would operate as a release to the son from payment of interest on all sums then due from him.

(1) 5 Hare, 306.
(2) Law Rep. 1 P. & D. 201.
(3) Law Rep. 13 Eq. 381.
(4) 12 M. & W. 591.

Further, the testator, after the recital of the debt, says: "I hereby release my son from the payment of any interest up to the time of my death." These words must operate to release from any interest whatever, quite irrespective of the particular amount of debt before mentioned.

Sir *R. Baggallay*, Q.C., and Mr. *C. Browne*, for the Defendants:—

The release of interest provided by the will must refer to that on the amounts then due from the son, and not to the interest on subsequent advances, when the former advances had been paid off. This is in accordance with the decision in *Douglas* v. *Douglas* (1).

In the case of *In re Gibson* (2), where a testator, being at the time possessed of £1000 guaranteed stock in the *North British Railway*, bequeathed to *A.* "my one thousand *N. B. Railway* preference shares," and after his will sold his guaranteed stock and died possessed of shares and stock in the same railway, acquired by several successive purchases, exceeding the amount bequeathed to *A.*,—it was held that, the bequest being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a "contrary intention" so as to exclude the operation of 1 Vict. c. 26, s. 24, sufficiently appeared upon the will, and that *A.* was not entitled to have his legacy satisfied out of the railway shares and stock in the testator's possession at the time of his death. That case is undistinguishable from the present.

[The MASTER OF THE ROLLS referred to *Smallman* v. *Goolden* (3), where a testator gave to his son "all sum and sums of money due to me from him on bond or bonds or any other security," and the son was indebted to the testator by bond at the date of the will, and afterwards became indebted to him by another bond; and the Court held that the bequest did not include the subsequent bond.]

Here the old debt has been extinguished and a new one created, which is the same in effect as if a legacy had been adeemed. In

(1) Kay, 400. (2) Law Rep. 2 Eq. 669. (3) 1 Cox, 329.

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such a case the 24th and 34th sections of the *Wills Act* do not apply, because a contrary intention appears in the will.

In *Du Hourmelin* v. *Sheldon* (1), which was under the old law, an appointment by will made in 1824 of certain bonds therein referred to, and all other bonds (if any) which the testator had any power to appoint or devise, which will was afterwards confirmed by a codicil, was held only to pass such bonds as were subject to the power. *Montague* v. *Montague* (2) was a somewhat similar case under the new law.

We contend, therefore, that the release was limited to the interest on the debt specifically referred to in the will, and that there has been no such confirmation by the codicil as to extend the release to interest on the subsequent advances.

Mr. *Southgate*, in reply, referred to *Wagstaff* v. *Wagstaff* (3), and *Trinder* v. *Trinder* (4).

SIR G. JESSEL, M.R.:—

This bill raises a question which has been, since the passing of the *Wills Act*, very often raised, and which I am afraid will continue to be raised very often for many years to come. The question is how far the provisions of the 24th section of the *Wills Act* apply to gifts of legacies as distinguished from gifts of residue.

Now the first question to be considered in all these cases is, what does the instrument mean. The will in this case deals with property rather peculiarly circumstanced, and the first duty of the Court is, to ascertain what the will meant. If I ascertain that the will meant to describe a specific sum then existing, it is conceded, as I understand, even by the Plaintiff, that the fact of a codicil being made substantially confirming the will, will not alter the nature of the gift. If, on the other hand, I come to the conclusion that the will does not deal with a specific sum, but deals with what is sometimes called a class of objects, subject from its nature to increase or diminution, then it is contended that the effect of the republication, or rather confirmation, by a codicil coupled with the 24th clause of the *Wills Act*, will extend that gift to after acquired

(1) 19 Beav. 389.
(2) 15 Ibid. 565.
(3) Law Rep. 8 Eq. 229.
(4) Ibid. 1 Eq. 695.

objects, which might be reasonably comprised in the original description.

The will is in these terms:—[His Honour then read the clause in question, and stated the facts of the case.]

Now the codicil in question was made on the 14th of May, 1870, shortly before the testator's death, which took place on the 25th of November, 1870, and for this purpose it is only necessary to say that it confirmed his will, except as altered and varied by the codicils, those variations not affecting the question I have now to consider.

The first contention, which was strongly urged on me, was, that the release of interest on the sum "of £1440 or thereabouts secured to me by bills, or notes, or otherwise," was not, under the circumstances to which I have referred, and in spite of the admissions of the bill that the £1400 or thereabouts due to the testator at the date of the will represented the sums referred to in the will as £1440 or thereabouts, to be referred to the sum then due, but that the testator intended to say sums which might be owing to him from his son generally. I am totally unable to accede to that argument. It appears to me to be a very plain and clear description of the sum then due, or, in the words of the bill itself, that those are the sums which are referred to in the will as "£1440 or thereabouts;" that is, that the testator was describing a particular sum; it was really £1400, he described it as "£1440 or thereabouts;" it was really secured by some promissory notes and bills of exchange, and he describes it as "secured to me by bills or notes or otherwise;" it was really owing from the son, he describes it as "due to me from my said eldest son." I am at a loss to conceive how it can be fairly and justly said that that is a general description as distinguished from a specific description. It seems to me it is very specific indeed. If, however, I had any doubt upon the subject, there is an old case to which I have referred, *Smallman* v. *Goolden* (1), which was much stronger, because the sum was not mentioned in that case, for there the gift was to the son of, "All sum and sums of money due to me from him on bond or bonds or any other security." Therefore, with the exception of the sum being mentioned, it was exactly the same as this case. Now there the security was by bond or otherwise, and it was held

(1) 1 Cox, 329.

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that the bond having been paid off and another sum advanced to the son upon a bond by the father, the second sum was not included in the gift. There it is very likely the second sum was advanced for the same purpose, at least I must assume so, as nothing is said to the contrary, and therefore in this respect also the case is stronger than this.

That being so, the only question remaining, as far as this point is concerned is, what did the codicil do? The codicil confirmed the will, except as altered or varied by another codicil. But if the legacy was adeemed or gone by the payment of the son in the meantime of the specific sum bequeathed, it could not be argued that the codicil gave a new sum, nor was it so argued. I have disposed of really the substance of the argument as it appears to me, which was that this was equivalent to a gift of the sums "due to me by my son;" I have held that it was a specific legacy, and therefore upon that ground I consider the son is not entitled to any benefit now under the will.

There was one point which was suggested by Mr. *Chitty* which I should not pass over. It was a very ingenious suggestion; I cannot (much as I should be inclined to do it if I had the power, and I think if the father were asked he would not wholly approve of my decision) alter the true interpretation of the will on any such grounds. The will does not certainly say any interest on the sum, but looking to the context, and considering that interest is in fact a sum due for the non-payment of a principal sum, and considering that the sum spoken of is a sum described in the first clause of the same sentence as due from the son, and that the time given for the principal sum is in the third clause of the sentence, I think the second clause, "I do hereby release my said son from the payment of any interest up to the time of my death," means interest on the particular sum, and not on any sum which might be owing under any circumstances. Therefore I am afraid I cannot give any effect at all to the clause in favour of the son under the present circumstances, and I dismiss the bill.

Solicitors for the Plaintiff: Messrs. *Shum, Crossman, & Crossman,* agents for Messrs. *G. & F. Brumell, Morpeth.*

Solicitors for the Defendants: Messrs. *Flux & Leadbitter,* agents for Mr. *B. Woodman, Morpeth.*

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[1870 B. 334.]

Creditor's Suit—Lapse of Time—Absence of Personal Representative—Acknowledgment of Debt—Executor de son Tort—Statute of Limitations—Costs.

A testator being, at the time of his death in 1857, indebted to *B.* on simple contract, gave by his will his real and personal estate to his wife for life, and appointed *J.* and *E.* executors. The will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the will was proved, and then *B.* filed his bill on behalf of himself and other creditors against the widow and the executors:—

Held, that the claim was barred by the *Statute of Limitations*, and that the bill must be dismissed with costs.

THIS was a suit by a simple contract creditor of a deceased testator for the sum of £100.

John Boatwright, the testator in the cause, was, at the time of his death, indebted to the Plaintiff in the sum of £100, secured in 1849 by a promissory note, interest whereon had been regularly paid.

The testator, by his will, appointed *John Boatwright* and *Eliza Boatwright* his executor and executrix, and gave to his wife *Elizabeth Boatwright* all his real estate and personal estate during her life, and after her death directed that the real estate should be sold as therein mentioned, and that the personal estate should be realized, and, subject to the payment of his debts, that the proceeds should be applied as therein mentioned.

The testator died in 1857, and his widow took possession of all the real and personal property, and paid to the Plaintiff the interest on the said sum of £100 down to the 1st of February, 1864, since which time no interest had been paid.

The testator's will was retained for many years by his widow in her own custody, and was proved on the 27th of September, 1870, by the executrix, *Eliza Boatwright*.

The bill was filed on the 18th of February, 1871, by the Plaintiff, on behalf of himself and all other the simple contract creditors of the testator against the testator's widow and *Eliza Boatwright*

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and *John Boatwright* as Defendants, and prayed the usual administration decree.

The defence was that the Plaintiff's debt was barred by the *Statute of Limitations*. *Eliza Boatwright*, by her answer, denied that she had assented to the payment of interest by her mother.

Mr. *Southgate*, Q.C., and Mr. *Freeman*, for the Plaintiff:—

The Defendants in this case rely on the *Statute of Limitations* as a bar to the Plaintiff's claim. As, however, interest was paid by the widow, who was tenant for life of the real estate up to the 1st of February, 1864, that must be considered as an acknowledgment of the debt within the meaning of sect. 5 of 3 & 4 Will. 4, c. 42, so as to bind the testator's real and personal estate. In *Roddam* v. *Morley* (1) payment by a devisee for life, under a will, of interest on a specialty of his testator's in which the heirs were bound, was held to be an acknowledgment made by the party liable by virtue of such specialty within the meaning of the statute. So here the payment of interest was made by one who was in the position of executrix *de son tort*, and the Plaintiff could not have sued her as devisee without the will, which she kept in her own possession; neither could he have sued the heir, as he was not in possession of the real estate. The statute would, no doubt, have been a good defence if it had begun to run in the lifetime of the testator, as in *Rhodes* v. *Smethurst* (2), although no personal representative was appointed; but here there was no one who could be sued until the will was proved on the 27th of September, 1870. In *Burdick* v. *Garrick* (3), Lord *Hatherley* observed: "I take the law to be that if the statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out." The same rule must apply to probate: *Douglas* v. *Forrest* (4). We submit, therefore, that time did not begin to run until the will was proved.

Mr. *Fry*, Q.C., and Mr. *Bury*, for the Defendants:—

The *Statute of Limitations* is a complete bar to the claim. The testator's widow, by taking possession of his property, constituted

(1) 1 De G. & J. 1.
(2) 4 M. & W. 42.
(3) Law Rep. 5 Ch. 233, 241.
(4) 4 Bing. 686.

herself executrix *de son tort*, and the Plaintiff could have sued her both at law and in equity under the statute of 43 Eliz. c. 8. Besides, whether the will was proved or not cannot affect the real estate.

Even if the Plaintiff could not have sued the executrix, or the widow as executrix *de son tort*, he might have taken proceedings to compel probate of the will, or have taken out administration himself. There is, however, authority to shew that he might have sued the widow: *Williams* on Executors (1).

In *Webster* v. *Webster* (2) the plea of the *Statute of Limitations* by an executor whose testator died in 1788, but of whose will no probate had been taken out till 1802, was allowed when the Defendant, the executor, had possessed himself of the personal estate, and, therefore, might have been sued as executor *de son tort* previously to 1802. In *Rayner* v. *Koehler* (3) a bill was sustained against an executrix *de son tort*, and although that case was not followed in *Cary* v. *Hills* (4), yet we submit that the principle is well established, and was recognised in *Coote* v. *Whittington* (5).

Mr. *Freeman*, in reply, submitted that, even if the Plaintiff's claim was held to be barred by the statute, yet, under the circumstances of the case, the bill should be dismissed without costs.

Sir G. Jessel, M.R., after stating the facts of the case, continued:—

When the testator died it appears that his widow took possession of the property, but no one proved the will. The will itself was not proved until many years afterwards, on the 27th of September, 1870, by the executrix, *Eliza Boatwright*.

The defence is the *Statute of Limitations*, which arises in this way, that *Elizabeth Boatwright*, who was the tenant for life of certain real estate belonging to the testator, paid interest up to the 1st of February, 1864, the bill not being filed until the 1st of December, 1870.

It is attempted to get rid of the operation of the statute by various ingenious arguments; and I must say that where a debt is

(1) 7th Ed. p. 265.
(2) 10 Ves. 93.
(3) Law Rep. 14 Eq. 262.
(4) Ibid. 15 Eq. 79.
(5) Law Rep. 16 Eq. 534.

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clearly admitted, and where this statute is used, as it is in this case, not with a view of protecting persons from a claim of which they doubt the truth and honesty, but for a purpose for which it was not intended, namely, to defeat an honest claim which is not brought forward within six years, the Court is anxious to listen to any fair ground which may bring the case of the creditor within some or one of the exceptions which have been established to the stringent provisions of the statute. For that reason I have looked into the authorities to see if I could discover any ground on which I could give relief to the Plaintiff, but I have not been able to find any.

The cause of action accrued in the testator's lifetime, and whether the will was proved or not is therefore immaterial. At the end of six years there is a bar. If it is said that the payment by the tenant for life prevented the statute running at all; it would operate to prevent it running against the real estate only, and even then more than six years have run since the last payment. It appears to me, therefore, to have been a perfect bar as regards the personal estate long before. The mere fact that there was no legal personal representative who could have been made a party to a suit, when, if there had been one, he, if made a party to such a suit, might have successfully pleaded the *Statute of Limitations,* cannot, by any possibility, be material.

If, as was contended by Mr. *Southgate,* the suit could not have proceeded in the absence of a legal personal representative, the only result would be, that, having lost the remedy against the personal estate, the Plaintiff would have lost it against the real estate also, notwithstanding the payment of interest. I hardly think that can be the law. I think it must be held, when the point comes to be decided, that if the remedy against the personal estate is barred, and the remedy against the real estate has been kept alive by reason of payment, that the Court will find some means of making the real estate liable, although the creditor cannot make the legal personal representative a party to the suit. However, it does not appear to me that this point really calls for decision now. It is suggested that the executrix assented to these payments by the tenant for life, and so kept the statute from running until 1864, but if that were the true view of the facts,

which however is denied by the answer, I think the case of *Webster* v. *Webster* (1) would apply, and the statute would be equally a bar.

Mr. *Freeman* made an appeal to me about the costs, but if I were to listen to it I should be simply trying another question which the statute says I am not to try.

The statute says that if a person elects to sleep upon his rights for six years, he shall not enforce them. I am not, therefore, I think, at liberty to say—whatever view I may entertain of the conduct of those who use the statute for such a purpose—that the statute is not a complete defence; and being a complete defence, I cannot deprive the Defendants of their costs because they take advantage of those rights which the Legislature has given to them. At the same time I cannot help feeling that it is a hard case, and I reluctantly dismiss the bill with costs.

Solicitors for the Plaintiff: Messrs. *Barton & Pearman.*
Solicitor for the Defendants: Mr. *W. Norris.*

(1) 10 Ves. 93.

V.-C. M.
1873
Nov. 18.

BIDE *v.* HARRISON.

[1872 B. 150.]

Will—Construction—"Money due at my Decease"—Unliquidated Damages.

A bequest of "all and every sum or sums of money which may be due to me at my decease" will pass damages recovered in an action by the executor for a breach of covenant committed in the lifetime of the testator.

SPECIAL CASE.

J. B. Harrison, by his will, dated the 12th of July, 1869, made a bequest to the Plaintiff in the following words: "All and every sum or sums of money which may be in my house or about my person, or which may be due to me at the time of my decease." He also appointed the Plaintiff and another person his executrix and executor. There was no residuary gift.

The testator died on the 19th of November, 1871, and his will was proved by the Plaintiff alone.

After his death the Plaintiff, as his executrix, recovered £229 4*s.* 6*d.*, damages in an action for breach of a covenant to repair contained in a lease made by the testator, and which expired in his lifetime. The damages were existing unliquidated damages at the time of the death of the testator.

The opinion of the Court was asked by the special case, whether the £229 4*s.* 6*d.*, or the damages of which the same is the ascertained amount, passed to the Plaintiff by the above-mentioned bequest.

Mr. *Glasse*, Q.C., and Mr. *Jolliffe*, for the Plaintiff:—

The damages recovered in the action constituted a claim payable in money, and due at the death of the testator, and the action only ascertained the amount which the lessee was liable to pay: *Crossley* v. *Elworthy* (1).

Mr. *Higgins*, Q.C., and Mr. *E. Ford*, for another legatee who was not interested in this question.

(1) Law Rep. 12 Eq. 158.

Mr. *North* (Mr. *Cotton*, Q.C., with him), for the next of kin of the testator:—

It is clear that these unliquidated damages are not money due at the death of the testator. They were at the time merely a claim of unascertained amount, and under such a gift nothing but a sum of money actually due can pass: *Stephenson* v. *Dowson* (1). It is for the Plaintiff to shew that the money was then actually due: *Martin* v. *Hobson* (2).

[The VICE-CHANCELLOR referred to *Booth* v. *Hutchinson* (3).]

Mr. *Jolliffe*, in reply, was stopped by the Court.

SIR R. MALINS, V.C.:—

The question is, whether a sum of £229 4*s.* 6*d.*, which was recovered by the executrix after the death of the testator, for a breach of a covenant in a lease to repair, where the breach took place in his lifetime, was money falling under the description of "all and every sum or sums of money which may be in my house or about my person, or which may be due to me at the time of my decease." I have had occasion to consider the point before, and I came to the conclusion, in *Booth* v. *Hutchinson*, that money afterwards recovered was actually due, although the precise amount was not ascertained. What was recovered in the action was not money accruing after the death of the testator, but £229 4*s.* 6*d.* was recovered because that was the amount which the lessee owed the testator in consequence of the breach of covenant, and I am of opinion that it must be considered as money then due to him, and that the action merely ascertained the amount. I am therefore of opinion that the £229 4*s.* 6*d.* passed by this bequest.

Solicitors: Messrs. *Bower & Cotton.*

(1) 3 Beav. 342. (2) Law Rep. 8 Ch. 401.
(3) Law Rep. 15 Eq. 30.

V.-C. B.
1873
Dec. 3, 4.

STEVENSON *v.* MASSON.

[1871 S. 206.]

Domicil of Origin—Abandonment—Domicil of Choice—Will—Bequest of Residue—Advancement—Ademption.

A merchant, a native of Canada, who carried on his business at *Montreal*, in 1858 retired from business, sold his residence, and also a plot of ground which he had bought for a grave, and went with his wife and two children to reside in *France*, for the purpose of educating the children. He resided in *France* till 1868. In 1867 his wife died there. Early in 1868 he went with his two children to *England*, and in March of that year he purchased a leasehold house at *St. John's Wood*. He furnished the house and continued to live there until his death, in May, 1871. In 1863, 1865, and 1870 he paid visits to *Canada*, on business principally relating to the management of the estate of his father, a Canadian, of whose will he and two of his brothers were the executors. When in *Montreal*, in 1863, he executed a will in the French language, and in the form usual in *Lower Canada*, in which he described himself as then residing at *Montreal*. By this will he in effect (in the events which happened) gave the residue of his property equally between his children on their attaining twenty-one. He also, during this visit to *Canada*, obtained there a certificate of domicil. In 1865 the testator, when he was in *Montreal*, executed a codicil to his will, also in the French language, and in a similar form to the will. The codicil did not affect the gift of the residue. In 1869 the testator's daughter was married in *England* to an Englishman. A settlement was made on her marriage in the usual English form. The trustees were Englishmen resident in *England*. By the settlement the testator covenanted with the trustees that he would during his life, or within six months after his death, pay to them £8500, to be held on trust for the daughter for her life, for her separate use, with remainder to the issue of the marriage. In 1869 the testator apprenticed his son to a merchant in *London*, to whom he paid a premium of £400. He also agreed to purchase for the son a share in the same merchant's business, and paid for this purpose £1100, and he made some other advances for the son. When he was in *Canada* in 1870 he told both his brothers, who resided there, that he intended to return there permanently in a few months. He expressed this same intention to his son, but never mentioned it to his daughter. The testator died in *England* in May, 1871. He had only two children, a son and a daughter, both of whom had attained twenty-one before his death. When he died, no part of the £8500 had been paid to the trustees of the daughter's settlement. The testator left no real estate in *England*, *Canada*, or elsewhere. His personal estate comprised Canadian and various foreign securities. There was some evidence to shew that the loss of his Canadian domicil would have

disqualified the testator, according to the law of *Canada*, from acting there as his father's executor :—

Held, that the testator's domicil at the time of his death was English :

Held, also, that the gift to the daughter of a share of the residue of the testator's estate was adeemed *pro tanto* by the £8500 covenanted to be paid by the settlement.

FURTHER consideration and motion to vary certificate.

This suit was instituted to administer the estate of *Joseph W. A. R. Masson.*

The testator was a native of *Canada.* He married there in the year 1847. He had two children, a daughter born in 1848, and a son, the Defendant, born in 1849. The testator carried on the business of a merchant at *Montreal* until the year 1858, when he retired and went to *France* with his wife and two children, for the purpose of giving his children a French education. Before he left *Canada* he sold his residence at *Montreal*, and he also sold a small piece of land in the burial-ground at *Montreal*, which belonged to him. He continued to reside in *France* until the year 1868, with the exception of two short intervals, during which he was in *Canada.* In July, 1867, his wife died in *France.* Early in 1868 the testator came with his children to *England*, and in March of that year he purchased the lease of a house at *St. John's Wood* for a term, of which more than thirteen years was unexpired. He furnished the house and lived there until his death on the 17th of May, 1871. He paid visits to *Canada* in 1863, 1865, and 1870, on matters of business principally connected with the management of the property of his father, a Canadian, of whose will he and two of his brothers were the executors. When the testator was at *Montreal*, in 1863, he executed a will in the French language, and in the form usually employed in *Lower Canada.* In it he described himself as residing at *Montreal.* By it he gave his wife an annuity for her life, or until her second marriage, and, subject thereto, he bequeathed the residue of his property to his children in equal shares on their coming of age. He also directed that no division of his property should be made until twelve months after his death, and he appointed his son and three other persons executors and administrators of his estate. When he was at *Montreal* on this occasion he obtained a certificate of domicil, and that he

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was a British subject. When he was in *Canada*, in 1865, he executed a codicil to his will, which was also in the French language, and in a similar form to the will. It did not affect the gift to the testator's children. On the 15th of November, 1869, the testator's daughter was married in *England* to a Mr. *Stevenson*, an Englishman. By a settlement dated the 11th of November, 1869, made in contemplation of the marriage, the testator covenanted with the trustees (also Englishmen, and resident in *England*), that he would "at such time or times during his life as he should think fit, or within six calendar months after his death," pay to them £8500, to be held by them on the trusts of the settlement, which were to pay the income to the wife during her life, for her separate use, without power of anticipation, and after her death to stand possessed of the principal on trust for the issue of the marriage as therein mentioned, with an ultimate remainder, in case there should be no child of the marriage, who, being a son, should attain twenty-one, or, being a daughter, should attain twenty-one, or marry under that age, in trust for the wife absolutely if she should survive the husband; but if the husband should be the survivor, then in trust for such persons as the wife should by deed or will appoint, and in default of appointment in trust for her next of kin, according to the *Statute of Distributions*. No part of the £8500 was paid to the trustees before the testator's death. In October, 1869, the testator apprenticed his son to a merchant in *London*, and paid a premium of £400 for so doing. He made further advances to his son. He also arranged to purchase, on his son's behalf, a share of the business of the merchant to whom he was apprenticed, and paid a further sum of £1100 for this purpose, which, with the other advances, were treated as gifts to the son, no interest being paid upon them. Both the children had attained twenty-one before the testator's death. The will and codicil were proved in the Probate Court of *London* by the son alone. The testator left no real estate in *England* or in *Canada*, or elsewhere, but part of his property was invested in Canadian securities and part in French and other foreign securities. The bill in this suit was filed by the daughter and her husband, an infant child of the marriage, and the trustees of the settlement, against the son, for the administration of the testator's estate. The testator died in *England* in May, 1871.

An administration decree was made in November, 1871, which contained (*inter alia*) a direction for an inquiry whether the testator was, at the respective dates of his will and codicil and death, domiciled in *England* or *Canada*, or where he was domiciled, and an inquiry what advances the testator had made to his children in his lifetime. The Chief Clerk found that the testator was, at all the dates mentioned, domiciled in *Canada*, and that the £8500 was an advance to the daughter. The Plaintiffs took out a summons to vary the certificate in these respects. Mrs. *Stevenson* deposed that her father never mentioned to her that he contemplated leaving *England* permanently. The Defendant deposed that his father had frequently told him that he fully intended to return to *Canada* for good in May, 1871. The testator's brothers both deposed that when he was in *Canada*, in 1870, he told them that it was his intention to return permanently there in a few months. There was some evidence to shew that, according to the law of *Canada*, the testator, if he had lost his Canadian domicil, would have been disqualified from acting as his father's executor in *Canada*. The question of domicil was argued first, because it was supposed that the English law would be more favourable than the Canadian to the contention of the Plaintiffs, that the £8500, secured by the settlement, was not an ademption of the gift to the daughter contained in the will.

Mr. *Eddis*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs :—

We say that the testator had an English domicil at the time of his death. The facts prove that he intended to abandon, and did abandon, his original Canadian domicil; and his purchasing a house in *England* and settling his children in life there are sufficient to shew that he acquired an English domicil. The most that the evidence proves is that he expressed an intention of returning to *Canada* permanently, but he never did any act to carry out that intention. To effect a change of domicil there must be *factum* as well as *animus: Udny* v. *Udny* (1); *Haldane* v. *Eckford* (2); *Hoskins* v. *Matthews* (3); *Attorney-General* v. *Fitzgerald* (4); *Brunel* v. *Brunel* (5).

(1) Law Rep. 1 H. L., Sc. 441, 458.
(2) Ibid. 8 Eq. 631.
(3) 8 D. M. & G. 13.
(4) 3 Drew. 610.
(5) Law Rep. 12 Eq. 298.

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Mr. *T. A. Roberts*, for another infant child of the daughter.

Mr. *Fooks*, Q.C., and Mr. *G. W. Collins*, for the Defendant:—

We say that the testator never lost his domicil of origin. He went to *France* for the special purpose of educating his children, and the facts do not warrant the inference that he intended to reside permanently in *England*. Mere residence is not enough to prove this, and here the residence in *England* was only for three years. The domicil of origin is always preferred to a domicil of choice. In all the cases cited there was something in addition to residence to shew an intention of making the residence permanent. The marriage of the testator's daughter and the settlement of his son in *England* are circumstances of no weight.

[They cited *Douglas* v. *Douglas* (1); *Aitchison* v. *Dixon* (2).]

SIR JAMES BACON, V.C.:—

In my opinion the facts do not justify the conclusion of the Chief Clerk. The law upon this subject has been very often canvassed, not only in the cases which have been referred to here, but in many others; and the rules are very distinctly expressed. The domicil of birth is *primâ facie* the domicil. It may be changed by the intention of the party—his voluntary intention—and it may be proved, by the facts and by the intention, that a new domicil has been acquired. Relying on that principle, and considering the evidence in this case, I cannot for a moment doubt that there was in point of fact a domicil acquired in *England* by the act of the testator, and that it was his intention to retain that domicil, and not to revert to his original Canadian domicil. The facts are very simple indeed. In 1858 a merchant, a man of business, who was in possession of some wealth, winds up all his affairs in *Canada*, sells his house, even sells his grave, and goes to *Paris* for the purpose of educating his children; and that object being accomplished, he comes to *England*. He takes a house there; he settles his children there. The marriage of his daughter and the apprenticeship of his son in the first instance, and the subsequent buying of a partnership for him, are as serious events in the course

(1) Law Rep. 12 Eq. 617. (2) Law Rep. 10 Eq. 589.

of a man's life as can well be considered with reference to his domicil.

Then it is said, that this conclusion is controverted by the fact that he went back to *Canada* upon matters of business and took part in the execution of his father's will. But from the vagueness of the expression "upon matters of business," I am bound to conclude that it was not anything serious. It is certain that he did not take a house in *Canada*, he did not tie himself in any way; he did nothing to shew any intention of remaining permanently in *Canada*. On the other hand, there was an intention that he should permanently remain in and inhabit the house he took in *London*, which was the very place in which he married his daughter and established his son as a merchant. The suggestion that if he gave up his Canadian domicil he would lose his authority to act as executor to his father's will, seems to be proved in the faintest way, if it can be said to be proved at all, and I do not think that if it was more distinctly proved it would at all alter the conclusion at which I arrive from the other facts. If he had any intention of regaining his birth domicil, other facts must have happened, and must have been capable of proof, if they had happened, from which I could draw that inference. I find, however, nothing but facts from which the inference is necessary, until it is rebutted, that the testator had established himself in *England*, meaning to reside in *England* all the days of his life, in which country he had established his children. That he died possessed of Canadian securities, does not help the question or affect it in any way whatever; for he also had French Rentes and French securities, and other property of various kinds. But he had no property whatever in the proper sense of the word in *Canada*. He had debts due to him in *Canada*, but no property there other than such debts.

I think, consistently with all the cases, and applying in its utmost strictness the rule which has been recognised in them all, that on the intention and on the facts the testator had chosen his domicil in *England* and died while that domicil was existing and was his. I find, therefore, dissenting from the conclusion of the certificate, that the testator was at the time of his death, domiciled in *England*.

The question of ademption was then argued.

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Mr. *Eddis*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

The advances to the son must clearly be treated as an ademption *pro tanto* of the gift to him by the will. A gift by will of a share of residue may be adeemed by a subsequent advance to a child: *Montefiore* v. *Guedalla* (1); *Lady Edward Thynne* v. *Earl of Glengall* (2). But we say that the gift to the daughter was not adeemed by the settlement, because the gift by the will was to her, whereas the settlement was on trusts wholly different: *Chichester* v. *Coventry* (3). Moreover, in this case, under the will the share was not to be paid till twelve months after the testator's death, while under the settlement the £8500 was to be paid within six months after his death.

[They cited also *Dawson* v. *Dawson* (4); *Trimmer* v. *Bayne* (5); *Cooper* v. *Macdonald* (6).]

Mr. *T. A. Roberts*, for another infant child of the daughter.

Mr. *Fooks*, Q.C., and Mr. *G. W. Collins*, for the Defendant, were not called upon.

SIR JAMES BACON, V.C.:—

In my opinion the question is sufficiently clear in itself, but if it were not it is entirely covered by the decisions in *Dawson* v. *Dawson*, *Trimmer* v. *Bayne*, and *Cooper* v. *Macdonald*. The argument which is based upon the distinction between the gift by the will and the trusts created by the settlement is not, I think, a substantial one. The subject-matter is the same, the intention is the same, but the father, who I suppose may be considered as the dictator of all settlements, thinks fit to make by the settlement a provision which is not repugnant to the provision in the will; not in the slightest degree inconsistent with it; but which only introduces those proper precautionary arrangements which would be naturally found in a settlement. That is the sole distinction to be drawn. In my opinion it is an unsubstantial distinction, and upon the authority of the cases which I have mentioned, not to say that

(1) 1 D. F. & J. 93.
(2) 2 H. L. C. 131.
(3) Law Rep. 2 H. L. 71.
(4) Law Rep. 4 Eq. 504.
(5) 7 Ves. 508.
(6) Law Rep. 16 Eq. 258.

there are other cases of equal value which might have been referred to, I think that the sums advanced to the son, and also the sum settled upon the daughter, must be brought into hotchpot for the purpose of ascertaining their interests in the residue.

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Solicitor for the Plaintiffs: Mr. *John Holmes.*
Solicitors for the Defendant: Messrs. *Monckton & Co.*

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V.-C. B. 1873 *Dec.* 10.

[1866 L. 16.]

Fraud—Jurisdiction—Injunction—Suit to restrain Action at Law, and to obtain Delivery Up and Cancellation of Policies—Proceedings stayed till after Trial of Action—Verdict for Defendant at Law—Costs of Suit.

Two actions were brought by the same Plaintiff against an insurance company upon two marine insurance policies. After issue had been joined an order was made at law staying one action until the other had been tried, on the terms of the Defendants at law being bound in both by the result of the one which should be tried. But the Plaintiff at law was not to be bound. The company, who resisted payment upon the allegation that the policies had been obtained by fraud, afterwards filed a bill in equity to restrain the actions, and to have the policies delivered up and cancelled. No injunction was moved for. An order was made in the suit staying the proceedings until after the decision of the action. Ultimately the action which was tried was decided in favour of the company, on the ground that the policy had been obtained by fraud. The Plaintiff at law then delivered up both policies to the company. Upon the suit coming on for hearing:—

Held, that a decree must be made for cancellation of both policies; and that the Defendants must pay the costs of the suit.

THE object of this suit was to obtain a declaration that the execution by the Plaintiffs of two policies of insurance upon goods shipped in a vessel called the *Peterhoff* was obtained by misrepresentation, and to have the policies set aside and cancelled. The bill also prayed an injunction to restrain the Defendant *Seymour* from further proceeding with two actions at law which he had commenced against the Plaintiffs on the policies.

The Defendant *Seymour* was an insurance broker. The other Defendants were various shippers of goods on board the *Peterhoff*,

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and the ship's brokers, for all of whom *Seymour* acted as agent. On the 3rd of December, 1862, the Defendant *Seymour*, as agent for the other Defendants, effected with the Plaintiffs a policy for £3000 on goods shipped in the *Peterhoff*. The insurance was declared to be "upon goods warranted no contraband of war." The voyage was to be from *London* to *Matamoras*, in *Mexico*.

On the 10th of December, 1862, *Seymour*, as agent for the other Defendants, effected with the Plaintiffs another policy for £3000 on goods in the same ship. This policy was expressed in similar terms. At this time a state of war existed between the *United States of America* and the so-called *Confederate States of America*. A considerable quantity of goods which were contraband of war were shipped on board the vessel, and this was done in pursuance of a prior agreement made by or on behalf of the Defendants with the Government of the *Confederate States*. The intention was to take the goods to *Matamoras*, and from thence to carry them across the border to *Texas*, one of the *Confederate States*, the ports of *Texas* being blockaded by the *United States*.

On the 7th of January, 1863, the *Peterhoff* sailed from *London*, but before she reached her destination she was seized by a cruiser of the *United States* and was carried into one of their ports. A portion of the cargo was afterwards condemned by a prize court at *New York* as contraband of war.

On the 7th of February, 1865, the Defendant *Seymour* commenced actions at law against the Plaintiffs on both the policies, and against other underwriters upon other policies which had been effected upon the residue of the goods shipped in the *Peterhoff*. The Defendants to the actions pleaded that the policies had been obtained by means of fraudulent concealment and misrepresentation. Issue was joined on the 15th of June, 1865. In November, 1865, an order was made by the Court of Common Pleas, on the application of the Defendants to the actions, that all the actions but one should be stayed until after one to be elected by *Seymour* had been tried, the Defendants in all the other actions agreeing to be bound by the result of that one if it should be in favour of the Plaintiff. *Seymour*, however, was left at liberty, in case the decision should be against him, to proceed with the other actions. This order was not drawn up

till the 15th of January, 1866, when *Seymour* elected to proceed with the action on the policy of the 10th of December, 1862. The bill in this suit was filed on the 31st of January, 1866. The action came on to be tried in November, 1866, when a verdict was found for the Plaintiff, subject to a special case to be stated by an arbitrator. It was stipulated by the Defendants to the action that the facts found by the arbitrator in the special case might be used by either party as evidence in this suit, and this was agreed to by the Plaintiff in the action. On the 24th of February, 1869, an order was made in the suit that the proceedings should be stayed until the special case at law should have been decided. On the 11th of August, 1871, the special case was stated by the arbitrator, and on the 3rd of June, 1872, the Court of Common Pleas gave judgment for the Defendants in the action, on the ground that the policy had been obtained by misrepresentation, and that there had been a breach of warranty by the Plaintiff (1). This decision was afterwards affirmed by the Court of Exchequer Chamber (2). The Defendants, by their answers in this suit, had denied that any of the goods shipped in the *Peterhoff* were contraband of war, and after the decision against them at law on this point they filed affidavits verifying their answers. The suit now came on for hearing, and the Defendants having delivered up both the policies to the Plaintiffs, the main question for argument was, how the costs of the suit were to be borne.

Mr. *Kay*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

We were right in filing the bill, and by it we have obtained the power of using the evidence in the action on the one policy in this suit upon the question of the validity of the other policy. We could not, except by filing this bill, have bound the Defendants to abide by the result of one action. Though we had a defence at law, we were entitled to come to this Court to obtain cancellation of the policies: *De Costa* v. *Scandret* (3); *India and London Life Assurance Company* v. *Dalby* (4); *Traill* v. *Baring* (5); *British*

(1) 41 L. J. (C.P.) 193.
(2) 42 Ibid. 111.
(3) 2 P. Wms. 170.
(4) 4 De G. & Sm. 462.
(5) 4 D. J. & S. 318.

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Equitable Insurance Company v. *Great Western Railway Company* (1). In the latter case there was only one policy in question. Our case is stronger, inasmuch as the verdict in our favour in the one action would have been no defence at law to the second action, though the defences were virtually identical. *Hoare* v. *Bremridge* (2) shews that, though the practice of this Court in a case of this kind is to adopt the action at law to try the question of fraud, yet this is done without prejudice to the exercise of its own jurisdiction when that question has been determined. We are entitled to a decree for a cancellation of the policies, and to our costs of the suit.

Mr. *Little*, Q.C., and Mr. *W. B. Heath*, for four of the Defendants:—

This was an unnecessary and vexatious suit. There is no authority for such a transfer of jurisdiction, or for enabling the successful party at law to inflict double costs on his adversary. The consolidation of the actions at law was made upon the application of the Plaintiffs in the suit, and after they had been parties to all the proceedings at law they filed the bill. There is no precedent for such a proceeding. The cases relied on are distinguishable. In *De Costa* v. *Scandret* (3) it does not appear that any action had been brought. In *India and London Life Assurance Company* v. *Dalby* (4), which was a demurrer, the parties had not joined issue in the action. So it was in *Traill* v. *Baring* (5) and *British Equitable Insurance Company* v. *Great Western Railway Company*. *Hoare* v. *Bremridge* does not support the Plaintiffs' contention. If, as the Lord Chancellor said there (6), the Court would act on the judgment at law, what is the use of the answers and evidence in the suit? *Ochsenbein* v. *Papelier* (7) shews that the Lord Chancellor did not approve such a transfer of jurisdiction.

Mr. *De Gex*, Q.C., and Mr. *W. D. Gardiner*, for other Defendants:—

The jurisdiction to order the delivery up and cancellation of

(1) 38 L. J. (Ch.) 132, 314.
(2) Law Rep. 8 Ch. 22.
(3) 2 P. Wms. 170.
(4) 4 De G. & Sm. 462.
(5) 4 D. J. & S. 318.
(6) Law Rep. 8 Ch. 29.
(7) Law Rep. 8 Ch. 695.

documents is never exercised in a case where there has been a litigation in which the judgment of a Court of law must be conclusive. This is really a suit for discovery, of which the Plaintiffs wish to avoid paying the costs.

Mr. *Westlake*, and Mr. *F. H. Linklater*, for other Defendants.

SIR JAMES BACON, V.C.:—

I wholly disclaim the imputation that I have any intention of acting in the face of the decision of *Hoare* v. *Bremridge* (1). I have heard what is to me a great novelty in the course of this argument. I had thought that a man who had been defrauded had a right to come to a Court of Equity to be relieved from the consequences of that fraud. The Plaintiffs in this suit file their bill, and state in plain terms: We have been cheated by misrepresentations made to us by or on behalf of the Defendants; they have got from us two policies of insurance; they can sue upon them—they are suing upon them; and for the reasons we allege in our bill we ask the Court to decree that those policies should be delivered up to be cancelled. That is about as plain an equity as can be stated. There has been an attempt to confuse the plainness of it by referring to what took place at law, but that only makes the Plaintiffs' case the stronger. There were two actions pending at law; there were proceedings in both, and in the result it was agreed that the facts between the parties should be turned into a special case, and the judgment at law delivered on the facts so found. The facts so found are that as gross and deliberate a fraud as can well be expressed in words was committed on the insurers—that the shippers had contracted with the Confederate Government to send articles contraband of war in the ship which was insured. The facts are plain and clear. There was a proceeding in the Court of Common Law by which the special case was arrived at, the result of which was that *Seymour* was to be bound as to one action, but free as to the other; while the Defendants were to be bound as to both. What is the consequence of that? It leaves the company, whatever might be the result of the action on the first policy, liable to have an action brought

(1) Law Rep. 8 Ch. 22.

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against them upon the other policy; and I am told there is a concurrent jurisdiction at law, and that the effect of that is to oust the jurisdiction of this Court. No case which has been referred to has said this, and anything more repugnant to the principles of this Court cannot be conceived. The Plaintiffs are driven to proceed with their suit. They would most willingly drop it; in fact, the correspondence that has been read shews they desired to drop it, and that there was no question between the parties but that of costs. The real substance of the case being what I have said, is it equitable that the Plaintiffs in this suit should be left to the chances—however remote, however improbable—that the policy upon which the judgment has not been pronounced shall be put in suit against them, and, whatever be the result, that it should lead to a prolonged litigation? Is that consistent with the practice of this Court? The cases that have been referred to do not touch the only question I have to decide, for in *Hoare* v. *Bremridge* (1) it is perfectly plain that, although the Lord Chancellor declined to interfere to restrain the proceedings at law, because that the matter should be decided by a common law tribunal was more convenient, still, in every part of his judgment he shews that he should adopt and act on the finding at law, and he leaves all the rest of the case —that relating to the cancellation of the policy, among other things—to be the subject of future consideration. What application that can have to the present case I am at a loss to see. Then *Ochsenbein* v. *Papelier* (2) was cited, in which the Plaintiff in equity complained that he was being wrongfully sued at law, because the ground of the action there was a judgment which had been fraudulently obtained—a case which might be decided from beginning to end in a Court of Common Law, there being no necessity whatever for approaching this Court. The distinction is perfectly obvious, for a Court of Common Law has no jurisdiction to order the cancellation of these policies. Notwithstanding the judgment of the Court of Common Law, the shippers' and brokers' right of action under the second policy remains. I cannot hesitate for a moment in making the only decree I am asked for now, viz., that the policies which have been delivered up shall now be cancelled.

(1) Law Rep. 8 Ch. 22. (2) Law Rep. 8 Ch. 695.

The Plaintiffs, to whom the policies have been delivered, are entitled not only to retain possession of them, but to a decree of the Court that they be now cancelled.

The costs of the suit alone remain to be disposed of. From what I have said it is apparent that the Plaintiffs never could have obtained the relief I am now giving them, but by bringing their suit to a hearing—unless the parties' good sense had suggested some other way of dealing with the case. What have the Plaintiffs done? They are accused of having acted vexatiously, and of having gone on with the suit unnecessarily. Of vexation I do not find a trace anywhere. As to the suit being unnecessary, I have disposed of that point; for I think it was absolutely necessary for their protection, and it was their plain right that the policies should be delivered up and cancelled. But if the charges of "vexation" and "want of necessity" are to be applied at all in this case, without hesitation I apply them to the Defendants. Their conduct has been, in my judgment, eminently unsatisfactory, vexatious, and unnecessary; for on the facts found in the special case it is plainly manifest that they one and all of them committed a fraud. This fraud they denied in their answers, and they justified that denial by afterwards again swearing to the truth of the statements in their answers. I never saw a case in which, in my opinion, the necessity of bringing a cause to a hearing was more plainly forced on reasonable Plaintiffs, and I cannot hesitate for a moment to make the decree I have stated, and to direct the Defendants to pay all the costs of the suit.

Solicitors for the Plaintiffs: Messrs. *Waltons, Bubb, & Walton.*

Solicitors for the Defendants: Messrs. *Phelps & Sidgwick;* Messrs. *Travers Smith & Co.;* Messrs. *Elmslie, Forsyth, & Sedgwick;* Messrs. *Linklater, Hackwood, & Co.*

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Dec. 12, 13.

HATHESING *v.* LAING.

[1870 C. 212.]

LAING *v.* ZEDEN.

[1870 L. 131.]

Shipping Documents—Bill of Lading—Mate's Receipt for Goods—Property in Goods—Equitable Assignment—Notice—Local Custom of Trade.

1 C P D. 657.

The master of a vessel may properly sign bills of lading in favour of the shipper of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel, and has no notice that any one but the shipper claims any interest in them.

The holder for value of bills of lading so given has a better title than an indorsee of the mate's receipts.

A local custom of trade was alleged to exist at *Bombay* by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading, and that masters of ships are bound to have the mate's receipt returned to them before signing any bill of lading for the goods mentioned in that receipt, and that if a captain signed a bill of lading without production and delivery to him of the mate's receipt for the goods, he would be bound, on the production of that receipt, to sign a fresh bill of lading, and to deliver the same to the person producing the mate's receipt, and that the goods mentioned in the receipt ought to be delivered to the person who produced the second bill of lading :—

Held, that such a custom, if proved to exist, would be inoperative as against the captain and the shipowners.

Heard by L.J. Giffard 735

THE bill in the first of these suits was filed by the members of a firm of cotton brokers at *Bombay*, who traded under the style of *Currumchund Premchund*.

The bill stated that for some time previous to May, 1870, the Plaintiffs had been in the habit of purchasing cotton in *Bombay* for a firm of *Harbord & Co.*, who were merchants in *Bombay* and in *London*. *William Harbord*, one of the partners, resided in *England; G. H. Wilkinson* and *John Harbord*, the other two partners, resided in *Bombay*. The bill contained the following allegations :—

Par. 2. "The course of business between the Plaintiffs and *Harbord & Co.* was that the Plaintiffs should purchase and pay for

the cotton, and have it delivered to themselves, and that afterwards they should load it on board ship at *Bombay*, taking the usual receipts for the cotton from the mate or officer in charge of the ship, which receipts were retained by the Plaintiffs and taken by them to *Harbord & Co.*, in order that the receipts might be indorsed to the Plaintiffs by *Harbord & Co.*, without *Harbord & Co.* at any time having possession of the same."

Par. 3. "The Plaintiffs so kept the receipts in order that they might preserve their right to the possession of the cotton, and the receipts so kept and indorsed to them were retained by them till the cotton represented by the receipts was paid for by *Harbord & Co.*"

Par. 4. "Upon such payment the receipts were handed over to *Harbord & Co.*, in order that they might present them to the captain of the ship, and obtain bills of lading, as they could not get bills of lading without the production of the receipts."

The bill went on to state that in the beginning of 1870 the Plaintiffs received orders from *Harbord & Co.* to purchase for them a large quantity of cotton. This cotton was accordingly purchased by the Plaintiffs, and was loaded on the steam ship *Alabama*, commanded by Captain *Bland*. Among the cotton so shipped were two parcels of eighty and eighty-two bales. Receipts for these two parcels, signed by the mate of the ship, were given to the Plaintiffs' agent. The receipt for the eighty-two bales was in this form:—

"S. S. *Alabama*.
"1st June /70.

"Received on board eighty-two bales of cotton *H. & Co.*

N C Marks.	5
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◇CP	69
N C	
N C P	8
	82

"*W. B. Dixon*,
"Chief Officer."

The receipt for the eighty bales was in a similar form.

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The bill contained the following further allegations:—

"In accordance with the usual course of business, the said receipts were taken by *Lulloobhoy Currumchund*, the Plaintiffs' agent, to *Harbord & Co.*, and, without his parting with the possession of the same, handed to them to be indorsed, and were indorsed by them and handed back to *Lulloobhoy Currumchund* as the agent of the Plaintiffs. A few days after the said receipts were so indorsed, *Harbord & Co.* requested the Plaintiffs or *Lulloobhoy Currumchund* to give them up, in order that *Harbord & Co.* might get from the captain of the ship bills of lading for the same; but the Plaintiffs or *Lulloobhoy Currumchund* refused wholly to do so without first receiving payment for the said cotton, as they did not wish to let *Harbord & Co.* have possession of the same without the usual payment. Upon such refusal, *Harbord & Co.*, who were also the agents in *Bombay* for the steamship *Alabama*, induced the captain to sign, and he did accordingly improperly sign and hand to them, bills of lading for the cotton represented by the said receipts, without the production of the receipts themselves. The captain signed the bills of lading as the agent of the owners of the ship."

On the 30th of May, 1870, *Harbord & Co.* drew two bills of exchange for £1000 each upon *James Wiseman & Co.*, of *London*. Each of these bills purported to be drawn against eighty bales of cotton per steamer *Alabama*, and to each of them was attached a bill of lading dated the 30th of May, 1870, and signed by Captain *Bland*, for eighty bales of cotton shipped by *Harbord & Co.* in the steamship *Alabama*, at anchor in the port of *Bombay*, and bound for *Liverpool*. These two bills of exchange were indorsed by *Harbord & Co.* the same day to a bank, called the *Comptoir d'Escompte de Paris*, whose agent at *Bombay* gave value for them. To each of the bills of exchange was also attached a letter of hypothecation of the cotton in favour of the *Comptoir d'Escompte*. These bills of exchange were sent to *London* and were accepted by the drawees, but were not paid at maturity. The Plaintiffs alleged that on the 13th of June, 1870, before the ship sailed from *Bombay*, they demanded of Captain *Bland* that he should sign and deliver to them a bill of lading for the 162 bales of cotton, and that he

refused to do so on the ground that he had already signed and delivered bills of lading for the same cotton to *Harbord & Co.* The ship sailed from *Bombay* on the 14th of June, and arrived at *Liverpool* on the 6th of August, when she was consigned to a Mr. *Zeden*, as ship's agent. The registered owners of the ship were *James Laing* and *Mary Gourley*, of *Sunderland*. On the 2nd of September, 1870, the Plaintiffs' solicitors gave notice to *Laing* and *Gourley* that the Plaintiffs claimed the 162 bales of cotton; they also gave notice to *Zeden* not to part with the cotton, and on the 16th of September the bill in this suit was filed against *Laing* and *Gourley*, *Zeden*, and the members of the firm of *Harbord & Co.*, praying a declaration that the Plaintiffs were entitled to have the 162 bales of cotton delivered up to them, or at any rate to a lien on the cotton for the purchase-money thereof; that, if the Plaintiffs were not so entitled, it might be declared that the Defendants *Laing* and *Gourley* were liable to make good to the Plaintiffs the value of the cotton; that a receiver might be appointed to sell the cotton for the benefit of the persons entitled thereto, and that in the meantime the Defendants might be restrained from parting with the cotton. On the 17th of September an order for an injunction in the terms of the prayer was made *ex parte*, and it was served on *Laing* and *Gourley* on the 28th of September, and on *Zeden* on the 29th of September. On the 29th of October, 1870, the *Comptoir d'Escompte* commenced an action against *Laing* and *Gourley* to recover damages for non-delivery to them of the cotton on the production of the bills of lading. On the 4th of November, 1870, the *Comptoir d'Escompte* were made parties by amendment to the suit of *Hathesing* v. *Laing*, without prejudice to the injunction. On the 8th of December, 1870, *Laing* and *Gourley* filed the bill in the second suit against *Zeden* and the *Comptoir d'Escompte*, praying for an injunction to restrain the *Comptoir d'Escompte* from further proceeding with their action, and on the 16th of December, 1870, an injunction was granted restraining further proceedings in the action until the hearing of *Laing* v. *Zeden*, on the terms of the Plaintiffs giving judgment in the action to be dealt with as the Court should direct; but execution was not to be issued without the leave of the Court(1).

By their answer, in *Hathesing* v. *Laing*, the *Comptoir d'Escompte*

(1) See Laing v. Zeden 1 Ch. D. 273 at p. 281.

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claimed the cotton as their property, and claimed to hold the bills of lading as purchasers for value, without notice of any irregularity in relation thereto.

The Defendants *Laing* and *Gourley* by their answer submitted that Captain *Bland* signed the bills of lading, not as their agent, but as the agent of *Harbord & Co.*, the charterers of the ship, and that, if the Plaintiffs had been damnified, the loss had arisen from their own neglect in not giving notice to the captain not to sign any bills of lading without notice to them.

The suit of *Hathesing* v. *Laing* now came on to be heard upon motion for decree.

According to the Plaintiffs' evidence, the mate's receipts for the cotton had never been out of their possession or that of their agents, although *Harbord & Co.* had requested that the receipts might be given up to them in order that they might be enabled to obtain bills of lading from the captain. The Plaintiffs also adduced the evidence of some European merchants at *Bombay*, which stated that, according to the usage and custom of merchants at *Bombay*, the mate's receipts for goods shipped on board a vessel represent the property in the goods therein specified, and are always negotiable in the *Bombay* market, and are sold and pledged, and pass the property in such goods in the same manner as bills of lading; that captains of ships are bound to have the mate's receipts returned to them before they sign any bill or bills of lading for the goods mentioned in those receipts; that it is the practice for brokers who have bought goods for shippers to ship them in their principal's name, but to retain the mate's receipts as their security and by way of lien on the goods so shipped; that if a captain signed bills of lading for goods without the production and delivery to him of the mate's receipts, he was bound, on the production of the mate's receipts, to sign a fresh set of bills of lading, and to deliver the same to the person producing the mate's receipts; and that the goods mentioned in the receipts ought to be delivered to the person who produced the second bill of lading.

Captain *Bland*, on behalf of the Defendants, *Laing* and *Gourley*, deposed that the *Alabama* was chartered to *Harbord & Co.;* that a large quantity of cotton was shipped by them in

her; and that till this suit was instituted he believed that all the cotton shipped in their name was their property, and that he knew no one else in the transaction. No notice was given to him that any persons besides *Harbord & Co.* were interested in the cotton. He said, also, that he never signed any bill of lading for any portion of the cargo of the *Alabama* on this occasion without having the receipts of one of the ship's people forwarded to him for the same; that he signed all the bills of lading at *Harbord & Co.'s* office. He said that he never heard of any such custom at *Bombay* as that mentioned in the Plaintiffs' evidence before the institution of the suit. He had never been at *Bombay* before this voyage. He denied that any application was made to him by or on behalf of the Plaintiffs to sign a second set of bills of lading.

Mr. *Eddis*, Q.C., and Mr. *Morshead*, for the Plaintiffs :—

We say that the *Comptoir d'Escompte* never acquired any property in the cotton by virtue of the bills of lading. They are entitled to every advantage which the bills of lading give them, but as the captain signed them wrongfully, without the production of the mate's receipts, no property passed by them. The evidence as to the course of dealing between the Plaintiffs and their principals is clear, and the alleged mercantile custom at *Bombay* is also clearly proved.

In *Craven* v. *Ryder* (1) Chief Justice *Gibbs* said: "The practice is that the person who is in possession of the lighterman's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt. Consequently the holder of that receipt retains a control over the goods at least until he has exchanged the receipt for the bill of lading." So, too, in *Ruck* v. *Hatfield* (2), where goods were sold free on board, but the vendor, when he delivered the goods on board the ship, demanded from the master a receipt acknowledging that the goods were shipped on account of the vendor, which receipt the master refused to sign, and afterwards signed bills of lading in favour of the purchaser's agent, it was held that the *transitus* was not at an end, and that the vendor had a right, on the insolvency of the

(1) 6 Taunt. 433, 434. (2) 5 B. & A. 632.

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purchaser, to stop the goods *in transitu*. Chief Justice *Abbott* said: "The Defendant (the master) ought not to have signed bills of lading until that receipt had been handed over to him by *E. & S.* (the purchasers), after having been delivered to them by the Plaintiff (the vendor)." In *Evans* v. *Nichol* (1) it was held that the holder of the receipt for goods signed by the mate of a vessel could maintain trover for goods shipped to be delivered to him, though no bill of lading was signed. On the authority of these cases, we have a right to the relief we ask, as against the *Comptoir d'Escompte*, inasmuch as the bills of lading, which they held could not, under the circumstances, pass any property in the cotton to *Harbord & Co.*, through whom they claim. Then, if we are not entitled to the cotton, or to a lien on it, *Schuster* v. *McKellar* (2) is a distinct authority that the shipowners are liable for the wrongful act of the captain in signing the bills of lading without the production of the mate's receipts, and it was held there that the property in the goods did not pass by the bills of lading. We do not dispute the authority of *Lickbarrow* v. *Mason* (3), but it has no application.

Mr. *Kay*, Q.C., and Mr. *B. B. Rogers*, for the *Comptoir d'Escompte*:—

Upon the evidence we say that the captain's account must be taken to be the true one; he never signed any bills of lading for any cotton shipped in the *Alabama* without seeing the mate's receipts for it, and he signed the bills of lading at *Harbord & Co.'s* office. But whether this be so or not, our title as purchasers for value, without notice of any irregularity, must prevail. In *Pease* v. *Gloahec* (4) it was decided that a bill of lading, though the possession of it was obtained by fraud, if indorsed for value without notice to the indorsee of the fraud, passes the property in the goods. That applies to the present case. The Plaintiffs may rely on the *dictum* of Lord *Campbell* in *Gurney* v. *Behrend* (5); "Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an

(1) 3 Man. & G. 614.
(2) 7 E. & B. 704.
(3) 2 T. R. 63; 6 East, 20.
(4) Law Rep. 1 P. C. 219.
(5) 3 E. & B. 634.

appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented;" but that *dictum* only applies to the case of a fraud committed upon the shipper. It does not apply to the present case, where a fraud is alleged to have been committed by the shippers themselves. No fraud committed by *Harbord & Co.* upon the Plaintiffs, with whom they had entered into a collateral agreement, can affect the right of the *bonâ fide* holders for value of the bills of lading. *Spalding* v. *Ruding* (1) does not apply. The right to stop *in transitu* is the right of an unpaid vendor; the Plaintiffs were not vendors, but brokers. In *Cowasjee* v. *Thompson* (2) it was held that the retention by vendors of the mate's receipts for goods, the bills of lading having been made out to the purchaser, was immaterial in a case where the vendor had elected to be paid by a bill of exchange. It is clear that the present Plaintiffs intended both the property and the possession of the cotton to be with *Harbord & Co.* The evidence of the alleged custom is insufficient, even if such a custom could have any validity.

Mr. *Miller*, Q.C., and Mr. *E. Beaumont*, for the shipowners:—

There is no case against us. Our duty was only to hand over the cotton to the person entitled to it. It is laid down in *Schuster* v. *McKellar* (3) that when a ship is chartered (as ours was) as a general ship, the master, in signing bills of lading, acts as the agent, not of the owner, but of the charterer. On the evidence, the captain's account of what he did must be believed. But even if the facts were as the Plaintiffs allege, they have no right against us. In all the cases cited on their behalf the question was whether the bill of lading was given by the master to some one whom he must have known not to be the true owner of the goods. There is no magic in the mate's receipts, and here the bills of lading were according to the terms of the receipts. There is nothing to shew that the Plaintiffs gave any notice of their claim to the captain

(1) 6 Beav. 376. (2) 5 Moo. P. C. 165. (3) 7 E. & B. 724.

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before he signed the bills of lading. The Plaintiffs have acted so as to justify the master in signing the bills of lading in the ordinary way.

Mr. *H. Burton Buckley*, for the ship's agent.

Mr. *H. A. Giffard*, for the trustees in bankruptcy of *William Harbord*.

Mr. *Eddis*, in reply:—

As to stoppage *in transitu*, the Plaintiffs were really in the position of vendors of the cotton. But the doctrine of stoppage *in transitu* goes beyond the simple case of vendor and purchaser, as appears by *Lickbarrow* v. *Mason* (1) and the cases there referred to. Then we say that the absolute right of property in the cotton did not pass from us till the mate's receipts were produced to the captain and the bills of lading were signed by him. This event never happened. In all the cases cited the holder of the mate's receipt for goods was recognised as entitled to the psssession till the receipts were produced and the bills of lading signed. A bill of lading is an *indicium* of title, but it cannot of itself create a title. This is plainly laid down in *Gurney* v. *Behrend* (2) as the distinction between a bill of lading and a bill of exchange. In *Pease* v. *Gloahec* (3) the bill of lading had conveyed a legal title, and there was an equitable title superadded. In *Cowasjee* v. *Thompson* (4) it was said that, if application had been made for the mate's receipts, they must have been handed back. If, as we say, no property in the cotton passed to *Harbord & Co.* till payment of the purchase-money by them and production of the mate's receipts, then the bills of lading, which were executed in fraud, can give no title even to a purchaser for value without notice. As to the shipowners, they are responsible for the fraud or negligence of their captain. The master is the agent of the charterers only within the limits of the charterparty. Beyond those limits he remains the agent of the owner: *Schuster* v. *McKellar* (5).

(1) 1 Sm. L. C. 4th Ed. 595.
(2) 3 E. & B. 634.
(3) Law Rep. 1 P. C. 219.
(4) 5 Moo. P. C. 165.
(5) 7 E. & B. 704.

SIR JAMES BACON, V.C.:—

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This case is very important if the several topics which have been urged have any application to it, or ought to regulate the decision. But in my opinion it can be disposed of upon much shorter grounds, and for the consideration of those grounds I turn first to the bill itself, and I there find that the course of business between the Plaintiffs and the firm of *Harbord & Co.* is thus described:—[His Honour read paragraphs 2, 3, and 4 of the bill.] That is the course of trade as it is described, and that, as I read, means that the Plaintiffs were brokers for *Harbord & Co.*, and bought on behalf of *Harbord & Co.* the cotton now in question, which they had a right to retain until they were paid their charges as brokers, including the amount they had laid out for their principals; and that that relation would give them a lien is beyond all doubt; but any other title than lien is not pleaded, and cannot, according to the circumstances of the case, exist. If the value of the cotton, after the Plaintiffs had bought it for *Harbord & Co.*, had increased, no matter to what extent, can it be doubted that *Harbord & Co.*, upon this statement of the course of business, would have been entitled to the increase upon paying the price contracted for? If there had been any diminution in the value, the Plaintiffs would have suffered no part of the loss occasioned by that diminution. Brokers they were, according to their own statement—brokers with a lien; and brokers generally, if not always, have a lien upon the goods which they purchase for their principals, and the possession of which they retain. Other rights than that the Plaintiffs do not allege that they have, and it would be inconsistent with every fact of the case to suppose that they had any other right. Whatever their possession was, their right being only to a lien, that lien was discharged as to the possession of the bales of cotton when they put them on board *Harbord & Co.'s* ship. There is no question about stoppage *in transitu*. They were *Harbord & Co.'s* goods from the beginning, subject to their paying the price; they were, by *Harbord & Co.'s* agents, the brokers, put on board *Harbord & Co.'s* ship, and a receipt was taken from the mate in the name of *Harbord & Co.* The bill states this distinctly and the evidence states it still more distinctly. The lighterman, coming alongside *Harbord & Co.'s* ship, delivered the goods on

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board the ship, and took a receipt describing the things which had been so delivered and shipped, and stating that they had been so delivered on account of *Harbord & Co.* The broker's lien was then gone. I am at a loss to see that the Plaintiffs had any other lien or right, or that they can by any perversion of terms be called vendors. [His Honour then read the above-stated allegations in the bill as to the indorsement of the mate's receipts by *Harbord & Co.*, and the handing them back, when so indorsed, to the Plaintiffs' agent; and also referred to the evidence on this point, and continued:—] Neither the bill nor the evidence states when that was done, and the time when it was done appears to me to be a point of vital importance in this case, because from the statements and from the nature of the transaction it is quite clear that the Plaintiffs thought the mere possession of the receipts was nothing. The possession of the receipts by them was simply an act of agency, and in proper course the receipts ought to have been handed to *Harbord & Co.*, and so the Plaintiffs evidently thought. They felt that they had parted with their lien, and that the receipts held by them were good for nothing, for they were *Harbord & Co.'s* receipts; and therefore they procured an indorsement to be made upon them. What is the effect of that indorsement? It is a transfer to the Plaintiffs of the right which *Harbord & Co.* had by virtue of the delivery of the mate's receipts, and it is upon that the Plaintiffs claim; upon that the whole of their complaint against the present Defendants is founded. Nor could they found their claim otherwise, for in every one of the cases that have been referred to, in which the mate's receipts are mentioned, they are mate's receipts taken by the true owner of the property, in order that his right to and possession of that property may not be questioned or disturbed by the fact of his having deposited the goods on board somebody else's ship. All that the captain has to do is to satisfy himself that the receipt expresses, in quantity and description, the goods which have been received on board the ship. Having done that in this case, he has discharged his duty; he has given bills of lading which are vouchers—vouchers which prevent him from ever thereafter saying that he did not receive these bales of cotton. That is the extent of his liability, and if he discharges himself from that liability, the possession of the mate's receipts

by somebody else than *Harbord & Co.* does not signify at all, and as between himself and *Harbord & Co.* it is not necessary even to produce the receipts. The goods were delivered on board as *Harbord & Co.'s* goods; the receipt of them as for *Harbord & Co.* was acknowledged, and it was given to the man who came alongside, that he might carry it to whomever it belonged. It went into the hands of the Plaintiffs, and it was held by them to be of no earthly use to them until they got a transfer by indorsement of *Harbord & Co.'s* right.

In my opinion it would add greatly to the perils of commerce if I were to hold, in opposition to every principle which regulates such transactions in this Court, that by that title which the Plaintiffs say they had acquired by means of indorsements of which they gave no notice to the captain, or to any one, until after it was too late for the captain to do anything for them, they can defeat the title of the bank. No such notice having been given, I am of opinion that the Plaintiffs' right cannot avail against the rights which the bank acquired through the bills of lading. See to what mischief it might lead if I were to decide otherwise. What difference is there between the mate's receipts and any other *chose in action*, or any chattel or book debt? A policy of insurance, for instance, may be well assigned in equity, but the assignment is of no avail unless notice is given to the insurer, who is the person to be charged. The captain of the ship, from the time he receives the goods, is chargeable with them. If he has no notice that any other owner in the world exists but the man in whose name the receipt has been given, what liability does he incur, when he signs and hands over the bills of lading to that man, other than that which he would incur by paying a debt to the person who, as far as he is concerned, is the sole creditor? This is the universal principle, and, in my opinion, it is directly applicable to the present case. If I thought that this principle required any support, it could not by any possibility derive a stronger support than from the facts of this case. Here is a captain sailing from the port of *London*, going to *Bombay* for the first time, knowing nothing about local customs, but knowing very well what his duty as skipper is. He is for fourteen days in the port of *Bombay*, half of which time is occupied in delivering the cargo that he brought

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there, and the other half in taking in the new cargo. During that time he signed a number of bills of lading. The Plaintiffs were assignees, it is said, by indorsement of the mate's receipts. Surely, for the common protection of innocent persons in mercantile transactions, it was incumbent upon them to give the captain notice. They saw him sign bills of lading daily. They knew he might sign a bill of lading at any time, and there was not the slightest intimation or notice given to him of their claim until, according to their own statement, the 13th of June.

The captain's account of what he did is very clear. But looking at the case only as a matter of law, what is there to induce me to say that, even after the transfer of *Harbord & Co.'s* rights by indorsement of the mate's receipts, no notice of it having been given to the captain, he was in the slightest degree in default in signing the bills of lading as he did? [His Honour then referred to the evidence at some length, and said that he should, as a jury, find in favour of the facts as stated by Captain *Bland* with regard to his signature of the bills of lading, and the application to him to sign a second set of bills of lading. He also referred to the evidence of the alleged custom, and continued:—] It is possible that some such pernicious and loose habit may prevail in the market at *Bombay*, but is that a custom I can adopt? Is it a local custom you can fix upon a captain from *Stepney* who saw *Bombay* for the first time in his life in 1870? It may be a custom between the parties concerned; but even taking it in the terms in which the witnesses express it, there is not a word about indorsing the mate's receipts, nor any suggestion that the indorsement, if it is of any use at all, does not create a new title, of which title notice must be given to the captain. Then they say that "captains or masters of ships are bound to have the mate's receipts returned to them before they sign any bill of lading for the goods mentioned in such mate's receipts." Why should I adopt that? It cannot be true. Suppose a mate's receipt to be lost, are the goods the captain's, so that he cannot be called upon to sign a bill of lading? If the captain satisfies himself by his own eyes and his own hands that the goods are on board, then the mate's receipts become to him a matter of perfect indifference, if he can only satisfy himself whose goods they are. He is told in this case, and he knows, that

they are the goods of *Harbord & Co.*, and therefore he signs the bill of lading in their favour. Then they say, "It is the general practice in *Bombay* of such of the European firms there as employ brokers to buy goods in the name of their brokers, but to ship the same in the firm's name, the brokers meanwhile retaining the mate's receipts as their security and by way of lien on the goods so shipped by them." The custom that these gentlemen talk about cannot override the plain well-established law, which is that to assert a lien you must be entitled to possession. They say again, "And that in the event of the captains or masters signing any bill or bills of lading for such goods without the production and delivery to them of the mate's receipts, such captains or masters are bound, on production of such mate's receipts, to sign a fresh set of bills of lading, and to deliver the same to the person producing such mate's receipts, and that the goods mentioned in such mate's receipts ought to be delivered to the persons obtaining such last-mentioned bills of lading." This is said to be a local custom which is to affect the shipowners at *Liverpool*, the captain from *Stepney*, and the bank at *Paris* who took these bills of lading as a good security for the money they advanced. I cannot pay the slightest attention to what is alleged. It is a custom against common sense; for if this were the law, what is to prevent a fraudulent shipper from transferring the mate's receipts after he had got the bill of lading; and, indeed, I have no evidence here that this indorsement was not made after the bill of lading was signed. Frauds to any extent might be committed. The only protection against this is, that in the interval between the signing the mate's receipts and the period when the bill of lading is asked for there shall be some notice given to the captain to make him hold his hand before he signs the bill of lading. If that had been done in this case, there would have been no such difficulty as has arisen. If the title set up could prevail without any such notice, it would expose the captain, the shipowners, and the whole commercial world to any fraud that dishonest people might think fit to practise. I think, upon the evidence, I must adopt what Captain *Bland* says as the true version of what took place. Having taken *Harbord & Co.'s* cotton on board his vessel, for which a receipt was given to them, he did not, as he says, sign the bill

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of lading without seeing the receipt. But if he had signed it without seeing the receipt, I think he would have been perfectly justified in doing so, and nobody would have any right to complain. Well, if that be so—if that is the law and conclusion to be drawn from the facts—what case have the Plaintiffs as far as the *Comptoir d'Escompte* are concerned? In the most ordinary course of trade they bought these bills of lading without notice of any prior title, and I can see nothing which can at all affect the validity of the security in their hands.

But then comes the case of the shipowners, and they are sought to be made liable on the authority of *Schuster* v. *McKellar* (1). That case does not furnish the slightest foundation for any such contention. In *Schuster* v. *McKellar* the shipowner had given directions to the captain to do what he did in storing the goods at *Calcutta*, and it was in consequence of his unjust interference that he was held liable. The question was put to the jury, and it was found by the jury against the owner, and the Judges were of opinion that it was properly so found, and they saw no reason to disturb the verdict, it being a question of fact, and the law applicable to it being the result of the facts. But that has no kind of application to the present case. In that case the only question that was considered was, whether *Schuster*, who had shipped the goods, was the real owner of them. He had bought them, and paid for them, and warehoused them, and he agreed to sell them again to *Coles Brothers*. Then, having sent the goods on board the particular ship, and having taken a mate's receipt, which was an acknowledgment that the goods were his, and that the skipper held them for him, he was afterwards induced to part with the receipt for a short time. Then he got it back again, but *Coles Brothers* persuaded the captain to sign the bill of lading for them. He had no more right than I to assign or give away another man's property. But, in all the cases that Mr. *Eddis* referred to, the validity of the mate's receipts was only in question, because they were title deeds held by the owner of the goods. Here the Plaintiffs never were the owners of the goods in the true sense; they were not their goods; the Plaintiffs were not cotton merchants, but cotton brokers. They had a right to retain the goods until they were paid their

(1) 7 E. & B. 704.

purchase-money, but they parted with this right and exchanged it, and they shew that they themselves knew they had exchanged it, because, having *Harbord & Co.'s* mate's receipts in their hands, they tried to perfect their title by getting *Harbord & Co.* to indorse the receipts on them.

Now I have already observed that the time when that transaction took place is of most vital importance. The Plaintiffs have brought their case into Court without saying when that took place, and that it might take place after the bills of lading were signed is perfectly clear, and thereby a very gross fraud might be committed if I yielded to the claim which the Plaintiffs have made. In my opinion there is no ground whatever upon which the suit can be sustained, either against the *Comptoir d'Escompte* or the owners of the ship. The other parties who appear are merely ornamental parties. I must dismiss the bill with costs against them, as well as against the shipowners and the *Comptoir d'Escompte*. The fund in Court must be paid to the bank.

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THIS suit was then heard.

Mr. *Miller*, Q.C., and Mr. *E. Beaumont*, for the Plaintiffs:—

This is really, though not in form, an interpleader suit, and according to *Nelson* v. *Barter* (1) we are entitled to our costs of suit. We were in this position, that we must either commit a breach of the injunction in the first suit, or be exposed to a verdict against us in the action. The Court of Law would not treat the injunction as any defence to the action. We were compelled to file this bill, as we could not before decree obtain any relief against our co-Defendants in the other suit. We offered the *Comptoir d'Escompte* to allow them to move in our names to dissolve the injunction in the first suit, but they did not accept our offer. We ought to have our costs of the second suit out of the fund in Court.

(1) 2 H. & M. 334.

V.-C. B. 1873

HATHESING v. LAING.

LAING v. ZEDEN.

Mr. *Kay*, Q.C., and Mr. *B. B. Rogers*, for the *Comptoir d'Escompte*:—

Nelson v. *Barter* (1) shews that the proper course of the shipowners was to file an interpleader bill, which this is not. They ought to have made the Plaintiffs in the first suit parties to the second suit, and then the Court would have ordered those Plaintiffs, who were in the wrong, to pay the costs of the second suit. The costs ought not to be paid out of the fund which is now decided to be ours. Moreover, this is not a case for interpleader at all. Our right was contested by an outside and entirely wrongful claim. The bill ought to be dismissed with costs as against us, and we are entitled to an inquiry as to damages under the undertaking of the Plaintiffs.

Mr. *H. Burton Buckley*, for *Zeden*.

SIR JAMES BACON, V.C.:—

I can do nothing in *Hathesing* v. *Laing* now, because the decree is made, and this subject was not mentioned when that was argued. I cannot recall my decree even if Mr. *Eddis* were present, because he would object to my doing so. I cannot, therefore, take that as an argument in disposing of the costs. I have not heard a reason why the action was brought.

Mr. *Kay*:—We were not parties to the suit then.

SIR JAMES BACON, V.C.:—I do not think that you ought to have put them to any such trouble, because there was after the amendment a suit properly constituted, in which every question could have been decided. I think, therefore, the Plaintiffs in the second suit must have their costs out of the fund.

Solicitor for the Brokers: Mr. *E. M. Hore*.
Solicitors for the Bank: Messrs. *Lyne & Holman*.
Solicitors for the Shipowners: Messrs. *Lowless, Nelson, & Jones*.

(1) 2 H. & M. 334.

Ex parte SHELLARD. *In re* ADAMS.

C. J. B.
1873
Nov. 29.

Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *ss.* 16, 48, 54—*Bill of Exchange—Order for Payment of Money—Equitable Assignment—Stamp—Evidence—Admissibility.*

Before the commencement of their liquidation two debtors had given to one of their creditors a letter addressed to a company for whom they were executing a contract, requesting the company to pay to the creditor £200 "out of moneys payable to us on the completion of our contract." This letter was delivered to the company, but it was never stamped. The trustee under the liquidation applied to the County Court for an order declaring the letter void as against him. The letter was produced by a witness who was examined *ex parte* in support of the application, and was marked as an exhibit. It was not produced upon the hearing of the application by the Judge:—

Held (affirming the decision of the County Court Judge), that the letter was inadmissible in evidence as being an unstamped bill of exchange, and not an equitable assignment:

Held, also, that the creditor who claimed under the letter could not succeed by means of the evidence adduced by the trustee, without production of the letter.

The letter was therefore declared void as against the trustee.

THIS was an appeal from a decision of the Judge of the *Bristol* County Court.

Messrs. *Adams & Kirby* were contractors. In August, 1872, they were engaged in carrying out a contract for the erection of some buildings for the *Bristol United Gaslight Company*, upon the completion of which they would have been entitled to receive from the *Gas Company* a considerable sum of money. At this time *Adams & Kirby* owed Mr. *Joseph Shellard*, a lime merchant, some money for lime which he had supplied to them, and at his request they, on the 24th of August, 1872, gave him the following written order upon the *Gas Company*:—

"*Bristol*, Aug. 24, 1872.

"To the Directors of the *Bristol United Gaslight Company*.

"Gentlemen,—We shall be obliged by your paying to Mr. *Joseph Shellard*, of *Keynsham*, the sum of two hundred pounds, out of moneys payable to us on the completion of our contract for

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certain buildings now being built by us for your company at *Canons Marsh*, and his receipt shall be a discharge of the same.

"We are, Gentlemen,

"Your obedient servants,

(Signed) "*Adams & Kirby.*"

This document was never stamped. It was taken to the *Gas Company* by *Shellard*, who asked the secretary whether it would make him safe; in reply to which the secretary said that he would take the notice, but would promise nothing, and that *Shellard* must take his chance. On the 18th of November, 1872, *Adams & Kirby* filed a liquidation petition, and on the 19th of December their creditors resolved upon a liquidation by arrangement, and appointed a trustee. *Shellard* afterwards claimed to be paid his £200 out of the moneys due to the debtors by the *Gas Company*, and this claim was resisted by the trustee. The trustee applied to the Judge for an order declaring the letter of the 24th of August, 1872, void as against him, and in support of this application he adduced as evidence a deposition of Mr. *Box*, the solicitor to the *Gas Company*, which had been previously taken *ex parte* on behalf of the trustee.

The letter of the 24th of August, 1872, was produced by Mr. *Box* on his examination, and was marked as an exhibit. Upon the hearing of the motion by the Judge, the counsel for the trustee took the objection that the letter of the 24th of August, 1872, was not admissible in evidence, as being a bill of exchange not stamped in accordance with the provisions of the *Stamp Act*. Mr. *Shellard's* counsel contended that the letter operated as an equitable assignment, and required a stamp as such, and offered to pay the proper stamp duty and the penalty. The letter itself was not produced at the hearing. The Judge held the objection good, and declared the order to pay void as against the trustee. Mr. *Shellard* appealed.

Mr. *Winslow*, for the Appellant:—

The letter does not operate as a bill of exchange, but as an equitable assignment of part of the debt due from the *Gas Company*, and it might, therefore, have been used in evidence on payment

of the proper stamp duty and penalty: *Diplock* v. *Hammond* (1); *M'Gowan* v. *Smith* (2); 33 & 34 Vict. c. 97, s. 16. The proper duty and penalty were tendered at the hearing. But if the letter did operate as a bill of exchange, it was not necessary that it should have been produced at the hearing of the motion, for the trustee had himself already proved it by his evidence, and we were entitled to rely on this. It is the same thing as if we had applied to enforce payment, and the trustee had admitted the signature and delivery of the letter; we need not then have produced it: *M'Gowan* v. *Smith*. If the letter was a bill of exchange within the meaning of sect. 48 of the Act, it is so as being an order for payment of money on demand. It therefore only requires a penny stamp, and may, by sect. 54 of the Act, be stamped on presentation for payment.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the trustee:—

Diplock v. *Hammond* is distinguishable from the present case. The *ratio decidendi* there was the distinction between an order to pay out of a fund and an assignment of the whole fund. Under the old Stamp Acts, orders to pay like the one now relied upon were held liable to be stamped as bills of exchange: *Ruff* v. *Webb* (3); *Butts* v. *Swann* (4); *Emly* v. *Collins* (5); *Firbank* v. *Bell* (6); *Parsons* v. *Middleton* (7). The present Act is more in our favour. This document comes within the definition of a bill of exchange contained in sect. 48 of the Act, and that being so, sect. 54 says that as it is unstamped the Respondent is not entitled to make it available for any purpose whatever. At any rate, the document was not in the Respondent's possession, and he could not produce it to be stamped.

Mr. *Winslow*, in reply:—

In *Diplock* v. *Hammond* the Lords Justices did not base their decision on the fact that there had been an assignment of the whole fund. In *McGowan* v. *Smith* there was only an order to pay

(1) 2 Sm. & Giff. 141; 5 D. M. & G. 320.
(2) 26 L. J. (Ch.) 8.
(3) 1 Esp. 129.
(4) 2 Brod. & B. 78.
(5) 6 M. & S. 144.
(6) 1 B. & A. 36.
(7) 6 Hare, 261.

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out of a fund. The letter in the present case is clearly not a bill of exchange by the law merchant; it can only be so, if at all, by virtue of the *Stamp Act*.

SIR JAMES BACON, C.J.:—

The distinction between assignments and bills of exchange or orders to pay is one which has been known for many years, and has been frequently the subject of decision. *Diplock* v. *Hammond* (1) was a case in which a document was held to be an assignment of the whole of a fund. The Court declined to force the construction by holding that it was only a bill of exchange. I have no inclination to dispute that decision, but in my opinion it does not govern the present case. The present is a pure case of an order for payment of money out of a particular fund at some future day not then fixed. It is liable to be stamped as a bill of exchange, or an order for payment not strictly a bill of exchange, but one within the meaning of the *Stamp Act*. It has no stamp, and the Judge of the County Court could not do otherwise than he did, viz., declare that it had no validity. When it is said that the trustee has himself furnished the requisite evidence, and that he has brought the document into Court and proved it, it is impossible for me to attend to that argument with any seriousness. He brought it into Court for the purpose of obtaining the decision of the Court that it was worthless, and he succeeded in that contention. That it would be directly against the policy of the *Stamp Act* to hold this document valid, nobody can for a moment doubt who has attended either to the statute or to the law which was in existence long before either of the Stamp Acts was passed. In my opinion the handing of this paper to the *Gas Company*, and the manner in which it was dealt with by them, the intimation by them that they could pay no regard to it, and that the person who delivered it must take his chance—all those circumstances shew that the Appellant was apprised from the first that the company did not recognise his claim. So that to say there has been an acceptance of the order, as there was in *M'Gowan* v. *Smith* (2), is wholly out of the question here. Upon the evidence which the

(1) 2 Sm. & Giff. 141; 5 D. M. & G. 320. (2) 26 L. J. (Ch.) 8.

Appellant has adduced it is quite clear that the document was meant to be, as in fact it is, an order for payment of money, and that it is of no validity, because it wants the stamp which the law requires. The appeal fails, and it must be dismissed with costs.

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Solicitors for the Appellant: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Benson & Thomas, Bristol.*

Solicitors for the Trustee: Messrs. *Walter, Moojen, & Son*, agents for Mr. *H. H. Beckingham, Bristol.*

Ex parte BARRY. *In re* FOX.

C. J. B. 1873 *Nov.* 29.

Order and Disposition—Chose in Action—Shares not standing in Bankrupt's Name, but in which he has an Equitable Interest—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

A bankrupt, before his bankruptcy, agreed to give, as security for a debt which he owed, his interest in some shares in a joint stock company which were already subject to a prior mortgage. At the commencement of the bankruptcy the shares were registered in the name of the first mortgagee. It was not satisfactorily proved that notice of the second mortgage had been given to the first mortgagee:—

Held, that the bankrupt's interest in the shares at the time of the bankruptcy was a *chose in action*, and was therefore not, under sect. 15 of the *Bankruptcy Act*, 1869, in the order or disposition of the bankrupt, and consequently that, subject to the first mortgage, the second mortgagee was entitled to the shares to secure his debt.

THIS was an appeal from a decision of the Registrar of the *Bangor* County Court, sitting as deputy Judge.

In September, 1868, *Andrew Barry* gave to *Edward Fox* £1690 to pay for some shares which he instructed him to purchase. *Fox* did not procure the shares, nor did he repay the money to *Barry*. He told *Barry* that he had 1671 preference shares of the *Cork and Bandon Railway Company* which were pledged to the *Bank of Ireland* to secure the repayment of a debt due by *Fox* to the bank, and that, subject to the claim of the bank, he (*Fox*) would hold the 1671 shares in trust for *Barry* to secure the repayment to him of the £1690. In May, 1869, *Barry* made a further advance of £400 to *Fox*, to prevent the shares being sold by the

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bank, and another similar advance of £95 was made by *Barry* in July, 1870. On the 20th of April 1870, *Fox* wrote a letter to *Barry*, in which, after specifying the *Cork* and *Bandon* shares, he said: "I hold the above securities of the *Cork and Bandon Company* for your account and at your disposal, subject to the payment of undermentioned loans," which were the loans from the *Bank of Ireland*. On the 5th of November, 1872, *Fox* filed a liquidation petition. At this time the 1671 shares were registered in the names of two officers of the *Bank of Ireland* as their nominees. The shares had never been registered in *Fox's* name. There was no evidence which satisfactorily proved that *Barry* had given notice to the bank of his charge before the commencement of the liquidation. *Barry* applied to the County Court for an order declaring that, subject to the debt due to the bank, the 1671 shares were *Barry's* property as against the trustee under the liquidation. The Registrar dismissed the application with costs. *Barry* appealed.

Mr. *J. Walton*, for the Appellant:—

The bankrupt's interest in the shares was only a *chose in action*, and therefore not within the order and disposition clause (sect. 15) of the *Bankruptcy Act*, 1869. *Ex parte Union Bank of Manchester* (1) is quite a different case, for there the shares were registered in the bankrupt's name. Moreover, the bankrupt was only a trustee of his equitable interest in the shares for *Barry;* he had executed a declaration of trust. He was not the reputed, but the real owner: *In re Bankhead* (2); *Ex parte Geaves* (3). As to the question of notice, the onus is on the trustee to shew that it was not given: *Ex parte Stevens* (4).

Mr. *Johnson* (solicitor) for the trustee, submitted to any order the Court might think right to make.

Sir James Bacon, C.J.:—

The bankrupt's interest in these shares was a *chose in action*, and nothing more; the bank were the legal owners. I am also of

(1) Law Rep. 12 Eq. 354.
(2) 2 K. & J. 560.
(3) 8 D. M. & G. 291.
(4) 4 Dea. & Ch. 117.

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opinion that the bankrupt was a trustee of his interest in the shares for Mr. *Barry*. The Registrar's order is wrong, and Mr. *Barry* is entitled, subject to the prior claim of the bank, to a security upon the shares for the amount which he claims, and which appears not to be in dispute.

Solicitors for the Appellant: Messrs. *Vizard & Co.*, agents for Mr. *J. J. Yates, Liverpool.*

Solicitors for the Trustee: Messrs. *Johnson & Coote.*

Ex parte BOLLAND. *In re* CLINT.

C. J. B. 1873 *Dec.* 8.

Marriage Settlement—Validity—Covenant by Husband to settle all Property which he shall acquire during the Coverture—Subsequent Bankruptcy of Settlor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.

A trader, in April, 1868, executed a settlement upon his marriage, by which he settled certain specific chattels upon trust for the benefit of his wife and the issue of the marriage. The settlement also contained a covenant by the settlor with the trustees that all future real or personal estate which he should at any time during the coverture be possessed of, or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, should be conveyed and assigned to the trustees upon the trusts thereby declared. In 1870 the settlor bought some shares in a joint stock company. In February, 1873, he was adjudicated a bankrupt. At this time the shares were still standing in his name, but the certificates were in the possession of his wife's father, and they were afterwards delivered to the trustees of the settlement. It was shewn that the settlor was solvent at the date of the settlement:—

Held, that the covenant was void as against the creditors, and that the trustee under the bankruptcy was entitled to the shares.

12 L.D. 317 322

THIS was an appeal from a decision of the Judge of the *Liverpool* County Court.

Henry Clint was a sailmaker and shipowner at *Birkenhead*. On the 8th of April, 1868, he married Miss *Derney*. On the 7th of April, in contemplation of this marriage, a settlement was executed between *Clint* of the first part (described as a sailmaker and shipowner), Miss *Derney* of the second part, and two trustees of the third part. This deed recited the agreement for the marriage: that *Clint* had effected an insurance on his life by a policy for

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£1000, and that he was also possessed of the household furniture, plate, linen, china, and effects mentioned in the schedule; and that, upon the treaty for the marriage, it had been agreed that the policy and the moneys to become due and payable in respect thereof, and also the said household furniture, plate, linen, china, and effects, should be assigned to the trustees, "And also that all and singular the real and personal estate to which the said *Henry Clint* shall at any time or times during the said intended coverture become seised, possessed, or entitled, should be released, transferred to, or vested in" the trustees, "upon and for the several trusts, intents, and purposes hereinafter expressed and declared of and concerning the same." The deed then contained an assignment to the trustees of the policy and policy moneys, and the furniture and other goods mentioned in the schedule, to hold the same on the trusts thereinafter declared.

The deed then contained a covenant by *Clint* with the trustees, "that all future real or personal estate, which the said *Henry Clint* shall at any time during the said intended coverture be possessed of or entitled to, or shall otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, shall be conveyed, assured, and assigned" unto the trustees for the time being "upon the trusts hereby declared." It was then declared that the trustees should stand possessed of the policy, household furniture, plate, linen, china, and effects and premises in trust for *Clint* until the intended marriage should be solemnized, and after the solemnization thereof upon trust as to the household furniture, plate, linen, china, effects, and premises specified in the schedule, to permit the intended wife to occupy, possess, and enjoy the same premises for her life, or until she should marry again, for her separate use, and in case *Clint* should survive her, then upon trust for him during his life, and, after the death of the survivor or the second marriage of the wife, on trust for the children of the marriage in equal shares at twenty-one or marriage, and if no children who should attain a vested interest, on trust for the survivor of the husband and wife absolutely. It was also declared that the trustees should hold the policy moneys upon trust to invest the same, and to pay the income to the wife for her life or until she should marry again, for her separate use without

power of anticipation, and after her death or second marriage to hold the trust moneys upon the same trusts as before mentioned with regard to the furniture, plate, linen, china, effects, and premises named in the schedule.

In February, 1873, *Clint*, who had been carrying on business in partnership, was adjudicated a bankrupt.

On the 2nd of April, 1870, *Clint* had purchased twenty-five shares in the *Lancaster Shipowners Company*, which were registered in his name. At the time of the bankruptcy these shares remained registered in the bankrupt's name, but the certificates of them were in the possession of his wife's father. They were afterwards delivered to the trustees of the settlement. The trustee under the bankruptcy claimed the shares, and applied to the Court for an order that the trustees of the settlement should deliver the certificates to him, and for a declaration that the shares belonged to the trustee under the bankruptcy as part of the property of the bankrupt.

The bankrupt's wife deposed that she remembered his telling her about two years after her marriage that he had bought some shares for her in the *Lancaster Shipowners Company*, and that they would belong to her and her children. The bankrupt deposed that he bought the shares with the intention that they should be part of his settlement property, and that he told one of the trustees so the day he bought them. This was confirmed by the trustee. There was evidence that the bankrupt was solvent when he executed the settlement. The Judge was of opinion that the settlement, having been executed in consideration of marriage at a time when the settlor was solvent, was good as against the creditors, and refused the application. The trustee appealed.

Mr. *Little*, Q.C., and Mr. *Bigham*, for the Appellant:—

We admit that the bankrupt was solvent at the date of the settlement; but we say, first, that the obligation to settle all property afterwards acquired during the coverture is not sufficiently expressed in the settlement. The covenant is more extensive in its language than the recital of the intention; and though there are trusts declared of the policy and the furniture, no trusts are declared of the property included in the covenant. Secondly: Such

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a contract by a trader, whether he was solvent or insolvent at the date of it, is a fraud upon his creditors, both under the statute of *Elizabeth* and under the bankruptcy statutes. The settlement describes the settlor as a trader, and its object was to enable him to carry on his trade and at the same time to withdraw from his creditors all the property which he might afterwards acquire during the coverture.

They were then stopped by the Court.

Mr. *De Gex*, Q.C., and Mr. *Butler*, for the trustees of the settlement:—

Future creditors have no vested right in future property of their debtor. Such a covenant as this has been supported in former cases against an assignee in insolvency, even when the settlor was insolvent at the date of the settlement: *Hardey* v. *Green* (1); *Lewis* v. *Madocks* (2). Such a covenant is not void for uncertainty: *Fyfe* v. *Arbuthnot* (3).

The present bankrupt never carried on business except in partnership, and his covenant could not affect the partnership assets until all the partnership debts were paid. The creditors of the partnership could not be injured. In the absence of fraud, the Court will not interfere with the provisions of an ante-nuptial settlement. Before the *Bankruptcy Act*, 1869 (which does not apply to this settlement), it made no difference whether the settlement was that of a trader or a non-trader. If this settlement could be set aside before the Act of 1869, there would have been no need for the provisions of sect. 91 of that Act. As to the construction of the settlement, that is clearly in our favour.

[They cited also *Ex parte McBurnie* (4).]

SIR JAMES BACON, C.J.:—

I think enough has been said upon this case. As to the first point, it is true that the words of the covenant are more extensive than those of the recital. Then, as has been very truly stated, there are trusts declared of the chattels and of the proceeds of the policy; but there are no trusts declared of the things

(1) 12 Beav. 182.
(2) 8 Ves. 150; 17 Ves. 48.
(3) 1 De G. & J. 406.
(4) 1 D. M. & G. 441.

comprised either in the recital or in the covenant. But suppose the wife by her next friend or the trustee were to file a bill (there being no insolvency) to have these things delivered over, could the husband be heard to say, "I will put my own construction on the covenant; those words do not mean any property I may acquire at any time"? Could he be heard to say, "I have declared no trusts of that property, and I will declare no trusts of it"? It seems to me that the property should be invested, and that the wife should have the income. If that were the only point in the case, I should consider it of little doubt.

But the other point is one for the most serious doubt. I am not aware of any case in which such a settlement as this has been held to be binding. I do not think *Hardey* v. *Green* (1) is in point, for none of the reasons which strike at the root of such settlements as this were in question in that case. That case was decided on a claim made by the assignees in the insolvency of the husband, which was resisted by the husband and wife. It has no resemblance to the case before me, and does not apply to the question here raised. I think *Lewis* v. *Madocks* (2) has as little application. Indeed, if properly examined, I think it is adverse to the present Respondents' claim, for I find there the main question was whether the husband, having entered into an engagement to settle all his personal estate, and having afterwards borrowed a sum of money, and laid it out with other moneys in the purchase of land, that borrowed money was included in his covenant to settle his personal estate. That question seems to have engaged Lord *Eldon's* attention, and he no doubt decided that the money which the husband borrowed became his personal estate, and that, although it had been laid out in the purchase of real estate, it nevertheless was subject to the engagement contained in the bond. But Lord *Eldon* seems very carefully to have guarded against the possibility that the person claiming this personal estate might be claiming it in competition with creditors of the husband, and (I do not say that he decided the case on that ground) in coming to the conclusion to which he did come, he must have considered that the creditors of the intestate husband were entitled to be first paid out of the personal estate, because he directed an inquiry as to the

(1) 12 Beav. 182. (2) 8 Ves. 150; 17 Ves. 48.

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amount of the debts, and he did not, until on the second occasion it was ascertained there were no debts, decide that the claim of the Plaintiff could be allowed. He had before cleared away all that was difficult in the case by deciding that money laid out in the purchase of real estate was nevertheless personal estate within the covenant, which should be considered as charged on and payable out of the real estate so acquired; but he carefully prevented the possibility of the persons making that claim coming into competition with, or claiming in preference to, creditors. Nothing can be more directly opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he may acquire during the coverture, down to the smallest particular, should be subject to the trusts which are supposed to be declared by this settlement. There are many cases in which such settlements have been set aside. There are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire, if at the time other persons, namely, his creditors, have the right to be paid out of the property. Having attended to the arguments of Mr. *De Gex*, and having considered the evidence before me, I must come to the conclusion that this delivery over of the certificates of the shares was in violation of the debtor's duty to his creditors, and that it cannot be sustained as against the trustee under the bankruptcy. The order of the County Court must be varied accordingly, but it is not a case for giving costs.

Solicitor for the Appellant: Mr. *W. W. Wynne*, agent for Messrs. *T. & T. Martin, Liverpool.*

Solicitors for the Trustees: Messrs. *Chester, Urquhart, & Co.*, agents for Messrs. *Wright, Stockley, & Co., Liverpool.*

Ex parte RADCLIFFE INVESTMENT COMPANY.
In re GLOVER.

C. J. B.
1873
Dec. 15.

Composition—Acceptance of Composition—Subsequent Resolution of Creditors to reduce the amount of Composition—Rights of Dissentient Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

The provision of sect. 126 of the *Bankruptcy Act*, 1869, that "the creditors may by an extraordinary resolution add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation," enables the creditors to reduce the amount of the composition previously accepted by them, and to bind a dissentient creditor to the same extent as he was bound by the original resolution.

The word "persons" in the above clause is used in contradistinction to the word "creditors."

THIS was an appeal from a decision of the Registrar of the *Manchester* County Court, sitting as Deputy Judge.

On the 22nd of January, 1873, *W. H. Glover*, *J. H. Thorley*, and *Robert Carlyle*, who carried on business in partnership at *Manchester*, as towel manufacturers, under the firm of *W. H. Glover & Co.*, filed a petition for liquidation by arrangement or composition with their creditors. The first meeting of the creditors was held on the 7th of February, 1873, when it was resolved by the proper statutory majority to accept a composition of 11*s.* in the pound, in satisfaction of the debts due to the creditors, the composition to be paid in three instalments, viz. 5*s.* in the pound four months after the second general meeting of the creditors; 3*s.* 6*d.* in the pound seven calendar months after the same date; and 2*s.* 6*d.* in the pound nine calendar months after the same date, promissory notes for each of the instalments being given to the creditors. These resolutions were duly confirmed at a subsequent meeting of the creditors held on the 18th of February, and were afterwards duly registered. Before the debtors filed their petition they were aware that a claim for a sum of about £8000 might possibly be made against them by Mr. *Halliday*, the trustee under the liquidation of a firm of *Child, Hornby, & Co.* They had, however, been advised by counsel that the claim was one which

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could not be sustained, and they did not therefore include it in the statement of debts produced to their creditors; and the composition which they offered was calculated with reference to the amount of their assets, on the supposition that the claim of *Halliday* could not be supported. The first instalment of the composition was duly paid to the creditors, and the promissory notes for the second instalment would have become due on the 24th of September. On the 11th of September an order was made by the Judge admitting the claim of *Halliday* for £7381 13*s.* 11*d.*, and directing the debtors on or before the 13th of October to pay into court £1845 8*s.* 6*d.*, being the first instalment of the composition of 5*s.* in the pound on the debt, and ordering that if the £1845 8*s.* 6*d.* should not be paid on the 13th of October, or if an appeal from the order should not be entered on or before the 31st of October, or if the appeal should be ultimately dismissed, the whole sum of £7381 13*s.* 11*d.* should be immediately paid by the debtors to *Halliday*. The debtors found that they would not be able to meet both the £1845 8*s.* 6*d.* and the promissory notes falling due on the 24th of September, and moreover, as it was then the Long Vacation, an appeal from the order could not be heard in time. It was thought, however, that *Halliday* might agree to compromise his claim for a smaller sum, and accordingly the debtors' solicitors on the 20th of September sent a circular to the creditors, informing them that, in consequence of the admission of *Halliday's* claim, it would be impossible for the debtors to pay the second instalment of the composition, and they invited the creditors to attend a private meeting at their office on the 23rd of September, in order to decide as to the course to be taken under the circumstances. This private meeting was held accordingly, and was attended by a large number of the creditors, and it was resolved to accept 2*s.* in the pound, in lieu of the instalment of 3*s.* 6*d.*, and to allow the payment to be postponed for a month, in order that a proper statutory meeting of the creditors might be called. One of the creditors was the official liquidator of a company called the *Radcliffe Investment Company*, who were creditors in respect of two bills drawn by the debtors. He did not attend the private meeting, and on the 24th of September he tendered the promissory notes which he held for the second instalment of the

composition for payment, but they were dishonoured; and on the 27th of September he commenced two actions against the debtors to recover the balances remaining due on the two bills after deducting the first instalment of the composition. On the 26th of September a statutory notice was given by the debtors' solicitors that a general meeting of the creditors would be held on the 8th of October "for the purpose of considering the desirability of passing an extraordinary resolution to add to or to vary the provisions of the composition of 11*s.* in the pound previously accepted by the creditors." On the 3rd of October the debtors gave notice to the liquidator of the *Radcliffe Company* of their intention to apply to the Court for an injunction to restrain him from further proceedings in his actions. This application came before the Registrar on the morning of the 8th of October, but he directed it to stand over till after the meeting of the creditors, which was to be held the same afternoon. The meeting was held that afternoon, and the creditors present resolved, by the proper statutory majority, that the provisions of the composition of 11*s.* in the pound should be varied, and that, in lieu of the second instalment of 3*s.* 6*d.* in the pound, an instalment of 2*s.* in the pound be accepted in full discharge of all claims against the debtors in respect of the second instalment of 3*s.* 6*d.* in the pound, upon the understanding, that the trustee of *Child, Hornby, & Co.'s* estate would accept £2000 in discharge of his claim upon the debtors, and upon the condition that the instalment of 2*s.* in the pound would be paid on or before the 24th of November, 1873. The liquidator of the *Radcliffe Company* did not attend this meeting. After this resolution had been passed, the Registrar granted the injunction asked for, and from this order the liquidator appealed. The resolution of the 8th of October was duly confirmed at a subsequent meeting of the creditors.

Mr. *Little*, Q.C., and Mr. *Bagley*, for the Appellant:—

When the second instalment of the composition was not paid on the day appointed, a right arose to bring an action for the balance of the original debt, which the Court would not interfere to restrain: *In re Hatton* (1); *Edwards* v. *Coombe* (2). The lan-

(1) Law Rep. 7 Ch. 723. (2) Law Rep. 7 C. P. 519.

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guage of sect. 126 (1) of the *Bankruptcy Act*, 1869, is very different from that of sect. 220 (2) of the *Bankrupt Law Consolidation Act* of 1849 (12 & 13 Vict. c. 106), and must be construed differently: *Slater* v. *Jones* (3). The power given by sect. 126 is to add to or vary the "provisions" of the composition, not to alter the amount. Moreover, the alteration is to be "without prejudice to any persons taking interests under such provisions who do not assent to" such alteration. Therefore a dissentient creditor is not bound by the alteration. It was never intended that the amount of the composition originally accepted in satisfaction of the debt should be altered in this way. If it can be done seven months after the acceptance, why should it not be done at any distance of time? and if it may be altered in favour of the debtor, why not in favour of

(1) Sect. 126 contains (*inter alia*), the following clauses:—

Par. 1. "The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor."

Par. 6. "The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the Registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance."

Par. 7. "The provisions of a composition, accepted by an extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shewn in the statement of the debtor produced to the meeting at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

Par. 11. "If it appear to the Court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

(2) Sect. 220. "In case any difficulty shall arise in the execution of the said resolution or agreement, it shall be lawful for the Court to cause a special sitting of the Court to be held; and the resolution of the majority of the creditors at such sitting, who have proved debts to the amount of £10, to confirm, alter, or annul the whole or any part of such resolution or agreement, shall be as valid as if it had been part of the original resolution or agreement: Provided however, that if one-third in number and value of the creditors of such petitioning trader do not attend such sitting, the resolution thereof shall not be valid unless the same is approved and confirmed by the Court."

(3) Law Rep. 8 Ex. 186, 189.

the creditor, in case the debtor received an accession of property? Under the circumstances the remedy of the creditors is to have the debtor adjudged bankrupt under the last clause of sect. 126.

Mr. *Benjamin*, Q.C., and Mr. *A. Barratt*, for the debtors:—

Sect. 126 of the Act of 1869 puts more power into the hands of the creditors than did sect. 220 of the Act of 1849. The meaning of the clause which gives the power to alter or vary the provisions is, that the creditors are bound by the alteration, but not other persons. For instance, the holders for value of the acceptances or promissory notes given by the debtors for the composition would not be bound. That explains the meaning of the word "persons." Otherwise this clause would be wholly inoperative, for those creditors who were willing to assent to the alteration could assent without a statutory meeting. No doubt on default in paying the second instalment the whole original debt revived at law. But this Court interferes with legal rights to prevent injustice. *In re Hatton* (1), and *Edwards* v. *Coombe* (2), do not apply. This is a case where the question ought to be tried, once for all, in the Court of Bankruptcy: *In re Thorpe* (3); *Ex parte Paper Staining Company* (4). The resolution to alter the composition had the same effect in binding all the creditors as the original resolution to accept it.

Mr. *Little*, in reply.

SIR JAMES BACON, C.J.:—

This case is no doubt one of great importance, and not without difficulty, because the whole question turns upon the 126th section, and the construction to be put upon it.

The Act of 1849 has been referred to. That Act has been repealed, and is no longer law, but it has been considered that it ought to be taken in illustration in construing the existing law. I think I am not only entitled, but bound to have regard to the provisions of that statute, for the purpose of ascertaining what the existing statute means. [His Lordship read the 226th section of the Act of 1849.]

Now the existing statute has made this striking and marked

(1) Law Rep. 7 Ch. 723.
(2) Ibid. 7 C. P. 519.
(3) Law Rep. 8 Ch. 743.
(4) Ibid. 8 Ch. 595.

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difference in the law of bankruptcy—that all, or nearly all, the powers and authority which were given to the Court under the former statutes are now transferred to the creditors. They are made the administrators and judges of their own affairs, and they are, under the terms of the statute, bound by the votes of a certain majority at a meeting duly convened. One of the things contemplated by the existing statute is to regard only the interests of creditors, and it is in their interest alone that it provides that it shall be in their power to prefer the acceptance of a composition to the issuing of proceedings in bankruptcy against their debtor, or to resorting to any other legal remedy they may possess. The 126th section gives power to the creditors, by an "extraordinary resolution," as there defined, "to resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." The section requires that the debtor, at the meeting of his creditors which is to be held, shall produce "a statement shewing the whole of his assets and debts." Those being the material and the necessary ingredients for the consideration which the creditors are invited to bestow upon the subject then submitted to them, there is no question in the present case that the requisitions of the statute were duly complied with. The creditors agreed to accept the composition of 11s. in the pound, to be paid by instalments, three in number, the first of which has been paid. Then an event happens which entirely alters the statement of assets and debts which had been laid before the creditors when they assembled and resolved to accept the composition; when a claim, the validity of which had been denied by the debtors, and which was only established against them after litigation and discussion, was at length established as a debt. That altered altogether the basis on which the original resolution had been passed, and then a state of things arose inconsistent (no matter how) with the object of the creditors at that meeting. It need not be directly inconsistent. The Act of Parliament does not mean that by contemplating the possibility of such an accident—for so I must read the 6th paragraph of the 126th section. [His Lordship read the paragraph.] It is upon the words of that paragraph, and upon them alone, that the case of the Appellant rests. Although many other topics have been referred to in the course of the

discussion, my decision must be guided by the construction which I put upon that clause, and, as I have said, in interpreting the meaning of this Act, I must draw what light I can from the law which existed before it was passed, and I must consider what was the policy and scope of the general provisions of the law establishing the administration in bankruptcy; and above all, I am bound to guard myself against contravening that policy or frustrating those provisions by any merely verbal construction which may be put upon some words contained in the clause I have referred to. Now no doubt the words "without prejudice to any persons," may be made to read "any creditors." But that, I conceive, is not the meaning. The creditors were bound by the original resolution, and their obligations are not ended by the passing of that resolution. The statute has said that in certain cases, by the passing of a new resolution or an addition to the resolution originally passed, the same consequences are to ensue, both to the debtor and the creditors, as would have ensued if it had been the original resolution. But still it does provide that the new resolution shall be "without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation." Now does the word "persons" there mean "creditors"? I conceive it does not according to the true construction of the section. I conceive that the word "creditors" having already been used—a word which has a significance which cannot be mistaken—and they being the persons who are to be bound by and to receive all the consequences of the resolution to vary, just as of the original resolution, it would be doing violence to the meaning of the section if I were to read the word "persons" as meaning "creditors," unless it be impossible to suggest any other construction. Is it, then, impossible to suggest any other meaning? There may be, and very often are, provisions in arrangements for composition which affect (I do not say bind) the interests of persons who are not creditors; persons who are not concerned in the statement of assets and of debts; not concerned in the consideration of the place the debtor personally occupies, nor influencing the conduct of the creditors towards him. There may be many such persons. But I find that in this Act of Parliament, and in every other Act in which compositions are mentioned, creditors are spoken of by the name of

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"creditors," and that is the name by which they are called in this Act. [His Lordship read the 7th paragraph of sect. 126.] The meaning of that section is, in my opinion, perfectly obvious and consistent with the policy of the law as it stood before, and as it is enacted by this statute. The explanation given by the debtors in this case was a perfectly satisfactory one. No bad faith is imputed to anybody in the omission of the debt to Messrs. *Childs, Hornby, & Co.* No doubt is thrown upon the veracity of the explanation, and I have no reason to doubt that the excuse offered for not inserting their names in the list of creditors is a perfectly true and valid excuse. So that at once I am furnished with the name of a "person" who is not to be "prejudiced" by any "addition or variation." Messrs. *Childs & Co.* are "persons" who in the very words of the statute are not to be "prejudiced." The creditors at the second meeting in October were satisfied that the true statement of assets and debts differed from that upon which they had agreed to accept a certain amount of composition. The amount of debts is different from that which they had contemplated, and they then assembled again, the present Appellant having notice of the meeting, and having the power of attending and saying or doing anything he thought fit, and I am told that the creditors unanimously agreed to accept a modified composition. If that is not within the power of creditors, then this Act of Parliament would have been passed in vain, for as we all know very well, a variety of accidents may happen in such cases, so as that the state of things may be changed from time to time, and changed either to the prejudice or to the advantage of the creditors.

Now, see what mischief and injustice I should be doing to the interests of the creditors, with whose interests this Appellant's interests are closely bound up by the original resolution, if I were to adopt his view of the section. I should frustrate and violate the provisions of the Act of Parliament if I suffered him, by reason of the accident which has happened, now, after the second extraordinary resolution has been passed, to continue the action at law, which he undoubtedly had a right to commence when the 24th of September had come and gone. Of course I do not suppose that anybody here will suspect me of any inclination to ques-

tion the validity or the soundness of the two decisions which have been mainly relied on. They have established a view of the subject at variance with that which I happened to take, and they must be taken to be right and I to have been wrong. I would guard, accordingly, against expressing any opinion that would contravene, or in the slightest degree infringe on, the principles on which the learned Judges of those two tribunals have laid down the law in those cases. The Appellant had at law a right to bring an action; but then he is none the less bound by the original resolution, and by the provisions of the Act, which made it competent to the creditors to say by their subsequent resolution that a less composition should be paid. He had a right, and he has exercised that right by issuing a writ. But he cannot escape from the original resolution, by which he was bound, and which was subject to the power of the creditors to vary it by an extraordinary resolution. The creditors have passed a second extraordinary resolution, and they have determined to accept a smaller composition, and by that resolution the Appellant was, I think, bound as much as he was by the original resolution.

I think the course which the learned Registrar took in the first instance was the just and proper course. When he was first asked to restrain the actions he could not do so, for at that moment there was only one set of resolutions in existence under which provision was made for payment of a certain composition, and it had not been paid. There was, therefore, then a right of action; and I think the Registrar would have mistaken the duties of his office if he had not postponed his decision until he had ascertained the result of the meeting then about to be held. The result of that meeting was, that the creditors present unanimously resolved to accept a smaller composition. In my opinion, upon the confirmation of that resolution the Appellant was bound, under the very terms of the Act of Parliament, and could no longer proceed with the actions which, but for the extraordinary resolution, he would, under the authority of the cases cited, have been well entitled to prosecute. The consequence of permitting him to do so now would be to neutralise that resolution. I do not see my way to do this in aid of a person who was bound by the original resolutions, as the law enables the creditors by whose resolution he was origi-

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nally bound, to vary or to add to the provisions of that composition which they at first accepted. I think that they have lawfully varied these provisions, and that there is no ground whatever for this appeal. It will be dismissed with costs.

Solicitors for the Appellant: Messrs. *Shaw & Tremellen*, agents for Messrs. *P. & J. Watson, Bury.*

Solicitors for the Debtors: Messrs. *Merriman & Pike*, agents for Messrs. *Partington & Allen, Manchester.*

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Ex parte POWIS. *In re* BOWEN.

Bankruptcy Act, 1869 (32 & 33 *Vict c.* 71), *s.* 32—*Preferential Debts—Wages and Salaries—Intended Prosecution of Debtor under the Debtors Act*, 1869—*Right of Trustee to retain Funds to meet Costs.*

Proofs were made against the estate of a liquidating debtor in respect of sums due for wages and salaries, entitled to priority under sect. 32 of the *Bankruptcy Act*, 1869. The trustee deposed that he intended to prosecute the debtor under the *Debtors Act*, 1869, and that he desired to examine him as to his affairs, and claimed the right to retain the funds in his hands, which were small, to meet costs:—

Held, that the preferential creditors were entitled to immediate payment.

THIS was an appeal from a decision of the Judge of the *Stourbridge* County Court.

On the 4th of November, 1872, *Samuel Bowen*, a glass master, filed a liquidation petition. On the 26th of November the creditors resolved on a liquidation, and appointed *Charles Powis* trustee. Five persons who had been in the debtor's employment tendered proofs against the estate for sums under £50, amounting altogether to £101, due to them in respect of wages or salaries at the commencement of the liquidation.

On the 4th of July an order was made by the County Court that the trustee should set aside and retain until further order, out of the funds in his hands, the sum of £120, for payment (in case the Court should so direct) to the five claimants of the amounts of their claims and their costs; and the further consideration of the application was adjourned till the 14th of August.

On the 14th of August the matter was again adjourned to the 28th of August, and on that day it was again adjourned to the 27th of September, to give the trustee an opportunity of examining into the claims; and the Judge said that, unless some sufficient reason should then be shewn by the trustee to the contrary, he should make an order for payment to the claimants. On the 27th of September the Judge ordered that the trustee should, within fourteen days after service of the order upon him, pay to the five claimants the sums due to them respectively, and their costs. From this order the trustee appealed.

The trustee deposed that, after crediting the payments and liabilities on account of the estate, he had not in hand more than £220, and that against this sum there was a claim for his costs as trustee; that he intended to take proceedings against *Bowen* under the provisions of the *Debtors Act*, 1869, and that he should require to retain in hand a sufficient sum to answer the costs of so doing; that he desired to examine the debtor as to his affairs, but had only recently obtained the information which would enable him to do so effectually.

Mr. *Bagley*, for the trustee.

Mr. *Winslow*, for the claimants, was not called upon.

SIR JAMES BACON, C.J., said that there was no ground for the appeal. The law entitled the claimants to priority, and it would be very unreasonable that their payment should be postponed until after the trustee's inquiry into the conduct of the debtor had been made. The appeal must be dismissed with costs.

Solicitors for the Trustee: Messrs. *Combe & Wainwright.*

Solicitors for the Claimants: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Bernard & King, Stourbridge.*

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Nov. 4.

FOTHERGILL *v.* ROWLAND.

[1873 F. 87.]

Contract for raising and selling Coal—Breach—Injunction—Specific Performance—Jurisdiction.

10 C.P.D. 82
22 Ch.D. 836. 7-4.
840

The Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform.

Accordingly, where the lessee of a colliery contracted to raise and deliver to the Plaintiffs all the get of coals in the colliery at a fixed price for five years, and subsequently agreed for the sale of the colliery to other parties:—

Held, on demurrer, that the Court had no jurisdiction to grant an injunction to restrain the breach of contract.

DEMURRER.

The Plaintiffs in this case, *Richard Fothergill* and *Ernest Thomas Hankey*, were ironmasters, carrying on the *Aberdare Ironworks*. The Defendant, *Richard Rowland*, was lessee of the *Newbridge Colliery*.

The bill alleged that the Plaintiffs had for some time been accustomed to purchase coals of the Defendant *Rowland*, and that at the time of making the agreement hereinafter mentioned there was a subsisting contract, under which *Rowland* was supplying the Plaintiffs from 1871 to the 4th of January, 1872, with a quantity of coal from the said colliery:

That at the time of the making of the agreement of the 6th of December, 1871, the *Newbridge Colliery* was only opened upon one seam of coal, called "the No. 3 seam," and was only partially opened on that seam; that *Rowland* was anxious to extend the openings in the seam, and had made representations to that effect to the Plaintiffs, and that he (*Rowland*) was short of capital for extending his works, and that, with a comparatively small outlay, the colliery would produce nearly 300 tons of coal a day, and that if a siding could be had on the *Taff Vale Railway*, near the *Taff Vale Ironworks*, he (*Rowland*) would be able to deliver the coals with greater facility and a considerable reduction of cost:

That the Plaintiffs were then in a position to consume at the ironworks a much larger quantity of coal than they had previously taken, and were disposed to make an arrangement with *Rowland* to supply him with capital to enable him to extend his colliery, and also to make an arrangement with the *Taff Vale Railway Company* for the construction of a siding, provided that *Rowland* would enter into a contract of sale to the Plaintiffs of all the coal which the said colliery would produce, for a lease of five years, provided that the quantity then supplied should not be less than a stated minimum:

That negotiations for an arrangement upon this footing resulted in an agreement, come to at a meeting between the Plaintiffs and *Rowland* on the 6th of December, 1871, by which they agreed that *Rowland* should sell to the Plaintiffs, and that the Plaintiffs should buy the whole of the get of the coal of the No. 3 seam of the said colliery for five years, the quantity not to be less than that then delivered to the *Taff Vale Ironworks*, unless the coal should fail, at 6*s.* per ton, provided that the *Taff Vale Railway Company* would provide a siding to which *Rowland* should forthwith make a road, and that the Plaintiffs should lend to *Rowland* £1000 to aid him in opening the colliery, and that this agreement was reduced to writing in the form of a pencil memorandum signed by *Rowland*, and about the same time the Plaintiffs agreed with *Rowland* that, besides the coal of the said No. 3 seam, another vein should be included in the contract, and, at the option of the Plaintiff *Fothergill*, any other vein of coal within the colliery should be included:

That the said agreements were reduced to writing by a memorandum in the form of a letter of the 4th of January, 1872, addressed to *Rowland* and confirmed by him in writing, and another memorandum subscribed thereto of the 5th of January, 1872, which were as follows:—

"Dear Sir,—I have been excessively occupied since our interview last month, and have not found time to sit down and write in detail that which we mutually agreed upon beyond the simple sale of coal described in the pencil memorandum we drew up together in the following terms:

"'6 Dec. 1871.

"'Sold *R. F.*, Esq., M.P., the whole of the get of the No. 3 coal

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out of the *Newbridge Colliery* property for five years, the quantity, not to be less than at present delivered to his *Taff Vale* works, unless the coal should fail, at 6*s.* per ton payment as usual.'

"To which I desire now to add that we arranged, when so required, that you would deliver the said coal into our waggons on a siding of the *Taff Vale Railway* at such a reduction in price as you could obtain off the cost in comparison with the delivery into the *Taff Vale* works, provided that the *Taff Vale Railway Company* would provide such siding (which you had not been able to obtain), and to which you would forthwith make a road; in reference to which I am glad to inform you that I have seen Mr. *Fisher*, and obtained his consent to his company providing the needful siding, a most valuable concession in prospect of the possibly very large quantities of coal you talked of flooding me with. I also promised to lend you £1000, to aid you in opening and developing the said colliery at the rate of £5 per cent. per annum interest, to be taken in such proportions monthly as you require in exchange for your acceptances at six months' date, all which please confirm, and I remain, "Yours faithfully,

"*Rich. Fothergill.*"

"5th Jan. 1872.

"It is understood between us that besides the No. 3 coal named herein that the *Forest Vach Vein* is included in the foregoing contract, and, further, that any other vein of coal worked shall be included at the option of Mr. *Fothergill* or representatives.

"*Rich. Fothergill.*
"*Richd. Rowland.*"

That in part performance of the said agreement *Rowland* had commenced to deliver coal from the said colliery to the ironworks; that the Plaintiffs had advanced to him the sum of £1000, which he had employed in extending the colliery; and that the siding was constructed by the *Taff Vale Railway Company* under the arrangement made with them by one of the Plaintiffs:

That after January, 1872, coal of the description yielded by the colliery increased very much in value, and that *Rowland* had appealed to the Plaintiffs to make some modification in the contract, which they had refused, though they had made an allowance

by way of gift to the amount of one-third of the contract price; but that no variations in the contract had been assented to by the Plaintiffs:

That coal of the description yielded by the colliery had advanced from 6*s.* to 13*s.* per ton:

That the Plaintiffs had discovered that *Rowland*, in violation of the terms of his agreement, was selling coal from the said No. 3 seam to other persons than the Plaintiffs; and that the deliveries were greatly below the minimum quantities specified in the contract:

That in August, 1873, the Plaintiffs discovered that *Rowland* had entered into an agreement with the Defendants *Spickett*, *Price*, *Bassett*, and *Meyer*, for the sale to them of the colliery; and that such agreement was entered into for the purpose of evading the performance on the part of *Rowland* of the agreement between the Plaintiffs and himself, and of depriving the Plaintiffs of their rights in the premises.

The Plaintiffs prayed, first, for an injunction to restrain the Defendants from selling, assigning, or disposing of or interfering with the colliery, except subject to the agreement between the Plaintiffs and *Rowland*; and from selling, disposing of or interfering with any coal gotten or to be gotten out of the said colliery, except for the purpose of the performance of the agreement; and, secondly, that it might be declared that the Plaintiffs were entitled to the whole of the get of the seam of coal No. 3, and of the *Forest Vach Vein* of the colliery, and also, at the option of the Plaintiffs, to the whole of the get of any other seam of coal worked at the colliery during the period of five years, upon the terms of the said agreement embodied in the memoranda of the 6th of December, 1871, and the 4th and 5th of January, 1872.

The Defendants demurred to the bill.

Sir *R. Baggallay*, Q.C., and Mr. *Crossley*, for the Defendants *Spickett*, *Price*, and *Bassett*:—

This is not a case in which Equity will grant any relief. The contract is only for the sale of chattels, and the proper remedy is by action at law to recover damages for the breach of the contract. This is not a contract which the Court could specifically perform.

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A somewhat similar case came before the Court in *Pollard* v. *Clayton* (1), where a bill was filed by the owners of ironworks against the proprietors of coal mines adjoining their works for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, to be raised and delivered to the Defendants at the rate of 500 tons per week, and for an injunction to restrain the Defendants from selling to other persons; a demurrer was allowed on the ground of laches, the bill not having been filed till eleven months after the Plaintiffs had discovered that the Defendants had ceased to deliver the coal to them and were delivering it to other parties.

Mr. *Fischer*, Q.C., and Mr. *Freeling*, for the Defendant *Meyer*:—

The contract in this case is merely to deliver coals at a certain place for a certain period, and cannot entitle the Plaintiffs to an injunction to restrain the delivery of the coal to other parties. The Court has often refused to extend its jurisdiction in the way of granting injunctions. Thus, in *Heathcote* v. *North Staffordshire Railway Company* (2) it was held that the Court had no power to interfere by injunction to prevent a party from applying to Parliament for an Act to authorize the abandonment of a scheme to which he was bound.

This case does not stand on the same footing as *Lumley* v. *Wagner* (3) or *De Mattos* v. *Gibson* (4). In the former case a public singer contracted with the lessee of a theatre that she would sing there for a certain period, and not elsewhere without his authority; it was held, on a bill filed to restrain her from singing for a third party, that the positive and negative stipulations of the agreement formed but one contract, and that the Court would interfere to prevent the violation of a negative stipulation, though it could not enforce the specific performance of the entire contract. That case rested on the peculiar value of the Plaintiff's voice, and the damages could not be estimated.

So in *De Mattos* v. *Gibson*, where it was held that when a ship was disposed of with notice of a prior contract entered into by the person disposing of it, the person taking it with such

(1) 1 K. & J. 462. (3) 1 D. M. & G. 604.
(2) 2 Mac. & G. 100. (4) 4 De G. & J. 276.

notice might be restrained from using it inconsistently with the prior contract. That case depended on the peculiar value of the ship.

An injunction is only ancillary to the enforcement of a contract, and the Court will not enforce a contract when damages for its non-performance can be ascertained by an action at law.

Mr. *Roxburgh*, Q.C., and Mr. *Gazdar*, for the Defendant *Rowland*:—

The Defendant *Rowland* contracted to supply the Plaintiffs with a certain amount of coal from his colliery. That is wholly different from a contract for the sale of a picture, to which there is a special value attached. In that case the Court would interfere to prevent its sale to another person because of its value to the man who bought it; whereas the get of coal in a particular seam has no such special value, and the Court could not compel the contracting party to deliver it, and has therefore no equity to restrain his disposing of it to others.

Mr. *Fry*, Q.C., and Mr. *Marten*, for the Plaintiffs, in support of the bill:—

The Plaintiffs in this case are entitled to the injunction prayed for by the bill, even although it may be doubtful whether specific performance of the contract would be enforced. If it had been a contract for the delivery of a particular kind of coal, it would, no doubt, have been enforceable: *Holroyd* v. *Marshall* (1); *Thorn* v. *Commissioners of Public Works* (2). Here the contract to sell and deliver to the Plaintiffs is exclusive, and implies a negative contract not to sell to any one else: and where that is so, the Court will grant an injunction, though it would not decree specific performance.

[The MASTER OF THE ROLLS:—Is there any case where the Court has laid down the principle on which an injunction can be granted where specific performance would not be enforced?]

The principle is recognised in *Lumley* v. *Wagner* (3), and in *De*

(1) 10 H. L. C. 191. (2) 32 Beav. 490.
(3) 1 D. M. & G. 604.

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Mattos v. *Gibson* (1), that where a person contracts to do a particular act a negative contract is implied, so that an injunction will be granted even where specific performance would be refused.

In *Sevin* v. *Deslandes* (2) it was held, that if a charterparty was entered into *bonâ fide* between the owner of a vessel and the charterer, the Court would grant an injunction to restrain either party from doing anything inconsistent with the charterparty.

So in *Le Blanch* v. *Granger* (3) it was held, that, though the Court could not decree specific performance of a charterparty, it could restrain the Defendants from employing a ship in a manner inconsistent with the rights under the charterparty.

In *Dietrichsen* v. *Cabburn* (4) the principle was laid down, that where a Plaintiff establishes his right to the benefit of a negative agreement on the part of a Defendant, or of his abstaining from a given act, the Court will equally interfere by injunction, whether the right be at law or under an agreement which could not otherwise be brought under its jurisdiction.

In *Catt* v. *Tourle* (5) the Plaintiff, a brewer, had sold a piece of land to the trustees of a building society, who covenanted with him that he should have the exclusive right of supplying beer to any public house erected on the land, but the Plaintiff did not enter into any covenant to supply it. A member of the society, who was also a brewer, bought a part of the land, with notice of the covenant, and erected thereon a public house, which he supplied with his own beer. On a bill by the Plaintiff to restrain him from so supplying the beer, the Court granted an injunction.

This is not a case in which damages could be ascertained at law, for three years of the contract are unexpired, and it would be difficult to assess damages in respect of the future non-delivery of the coal.

Besides, coal in a colliery is not to be treated as if it were a mere chattel; the contract is one relating to real estate.

Sir *R. Baggallay*, in reply on the question of costs.

(1) 4 De G. & J. 276. (3) 35 Beav. 187.
(2) 9 W. R. 218. (4) 2 Ph. 52.
(5) Law Rep. 4 Ch. 654.

SIR G. JESSEL, M.R.:—

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I feel no doubt whatever on the question, therefore I think it is my duty to give a decision. I never did approve, when at the Bar, and I do not approve now, when on the Bench, of the practice of not deciding a substantial question when it is fairly raised between the parties and argued, simply because it is raised by demurrer. It is a great benefit to all parties to have the question in the case speedily and cheaply determined, and the practice of demurring ought, if possible, to be encouraged.

The question is one which I am sorry to have to decide against the Plaintiffs. No honest man, whether on the Bench or off it, can approve of the conduct of the Defendants. The first Defendant, *Rowland*, has entered into a contract *bonâ fide* for valuable considerations to sell a quantity of coal to be raised from his mine to the Plaintiffs. He has received the advantages of the contract, and because coal has risen in value and he can get a better price elsewhere, he does not choose to perform his contract. Such conduct ought not to meet with the approval of anybody. Then the question I have to determine is, whether the Plaintiffs have come to the right Court to obtain that which the law will undoubtedly give them, namely, compensation in some shape or other for the loss they have sustained by this breach of contract. It appears to me, as the law now stands, a Court of Equity cannot give them any relief.

The first question is, what is the contract for? In my view of the contract it is one for the sale of coals, that is, coals gotten, the get of coal, the severed chattel, and it has no relation whatever to a contract for real estate. That point really was not argued by Mr. *Fry*, although Mr. *Marten* did touch upon it. I think it must be assumed, therefore, to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal, or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the Plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the Defendant *Rowland*.

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It is said, however, that, although you can ascertain the market price as regards all the past non-delivery, you cannot ascertain exactly the market price as to future deliveries. To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years (which is the case here, for there are three years unexpired of the contract), is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practise on what is called the other side of *Westminster Hall.* There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law.

That being so, what is there to distinguish this from any ordinary contract for the sale of goods? We have been told it has some connection with the colliery. I suppose coals must necessarily have connection with a colliery, and it happens that the person who sold the coal to be produced from a given colliery was also at that time the owner of the colliery. I apprehend there is no difficulty about entering into a contract for the sale of coal coming from a particular colliery by persons not owners of that colliery; that is the common practice. The coals not being delivered, and there being no means of obtaining their delivery without compelling the Defendant *Rowland* to raise them, it has been admitted before me that this is a contract of which you cannot obtain a specific performance in a Court of Equity.

Therefore any relief to be obtained by the Plaintiffs in the shape of compensation must be obtained at law, and I do not understand that the Plaintiffs, coming here for an injunction which they ask, are willing to abandon their claim to compensation at law in the shape of damages.

Then it is said, assuming this contract to be one which the Court cannot specifically perform, it is yet a case in which the Court will restrain the Defendants from breaking the contract. But I have always felt, when at the Bar, a very considerable difficulty in understanding the Court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. If it is right to prevent the Defendant *Rowland* from

selling coal at all—he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration—why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down, or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the Court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the Court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the Court at all, or something of that kind.

That being so, and not being able to discover any definite principle on which the Court can act, I must follow what Lord *St. Leonards* says, in *Lumley* v. *Wagner* (1), is the proper conduct for a Judge, in not extending this jurisdiction. I am not, however, entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration, by a very great Judge, Lord *Cottenham*, in *Heathcote* v. *North Staffordshire Railway Company* (2), where he says: "If *A.* contract with *B.* to deliver goods at a certain time and place, will Equity interfere to prevent *A.* from doing anything which may or can prevent him from so delivering the goods?" That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the *dictum* of Lord *Cottenham* express on the subject, and the Plaintiffs' counsel not having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods or

(1) 1 D. M. & G. 604. (2) 2 Mac. & G. 112.

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any chattel, in a case in which specific performance could not be granted, I think I shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which Equity can afford no relief.

With regard to the question of costs, I think it is undesirable to take the technical admission of the facts of the bill, when a person files a demurrer, to be an admission of the truth of the facts against him for the purpose of costs. If there is no remedy at all at law, I think the rule that the costs should follow the result too valuable a one to be tampered with. On these grounds I allow the demurrer, with the usual consequences.

A petition of appeal was presented against this decision, but the case was compromised before it came to a hearing.

Solicitors for the Defendants: Mr. *I. H. Wrentmore;* Mr. *W. Kelly;* Mr. *Gosling.*

Solicitors for the Plaintiffs: Messrs. *Sharp & Ullithorne,* agents for Messrs. *Simons & Plews, Merthyr Tydvil.*

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YSTALYFERA IRON COMPANY *v.* NEATH AND BRECON RAILWAY COMPANY.

[1872 Y. 11.]

Railway Company—Compulsory Powers—Notice to treat—Extension of Time—Abandonment—Subscription Contract—Magistrate's Certificate—"Sufficient Evidence"—Lands Clauses Act, s. 17.

4 Ch D. 592
22 Ch D 340
49

The *J. Railway Company's Act,* passed in July, 1864, provided that certain persons who had subscribed, and all others who should subscribe, to the undertaking, should be incorporated for the purpose of making the railway thereby authorized, and by the same Act the compulsory powers for taking lands were limited to three years, and the time for completing the works to five years from the passing of the Act. The company, having obtained the magistrate's certificate that the whole of the required capital had been subscribed for, served a notice to take certain lands of the Plaintiffs. In 1869 the company, having failed to raise sufficient capital to make the line, obtained an Act, of which the Plaintiffs had notice, for amalgamating their

company with the *Neath and Brecon Company*, who were to make the railway, and the time for completion was extended to July, 1872. In 1871 the *Neath and Brecon Company* proceeded under the notice to take the Plaintiffs' land.

On a bill praying an injunction to restrain the *Neath and Brecon Company* from taking the land, alleging that the notice to treat, if valid, had been abandoned by lapse of time, and that such notice was invalid, as no subscription contract had been proved, and the required capital had not then been subscribed for:—

Held, that, under the circumstances, there had been no abandonment of the notice:

Held, also, that the magistrate's certificate, under sect. 17 of the *Lands Clauses Act*, was conclusive evidence that the capital was subscribed for; that it appeared from the *J. Railway Company's Act* that there was a subscription contract, and that the notice to treat was valid.

THIS was a suit by the Plaintiff company, who were in the position of landowners having an interest in certain lands taken by the Defendant company under their alleged compulsory powers, to restrain them from continuing in possession.

By the *Swansea Vale and Neath and Brecon Junction Railway Act* (called in the pleadings the *Junction Railway Act*), passed on the 29th of July, 1864, the *Swansea Vale and Neath and Brecon Junction Railway Company* (called in the pleadings the *Junction Railway Company*) were incorporated and authorized to construct their line.

The Act contained the following sections:—

Sect. 4. "*Anthony Morgan Story Maskelyne* (and four other persons therein mentioned), and all other persons and corporations who have already subscribed, or who shall hereafter subscribe, to the undertaking, their executors, administrators, successors, and assigns respectively, shall be united into a company for the purpose of making and maintaining the railway and works hereby authorized; and such company shall be incorporated by the name of the *Swansea Vale and Neath and Brecon Junction Railway Company*, and by that name shall be a body corporate, with perpetual succession and a common seal, and shall have power to purchase and hold lands for the purpose of the undertaking."

Sect. 21. "The powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years after the passing of this Act."

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Sect. 22. "The railway shall be completed within five years from the passing of this Act, and upon the expiration of that period the powers by this Act granted to the company for executing the same, or others in relation thereto, shall cease to be exercised, except as to so much thereof as shall then be completed."

On the 16th of February, 1866, the following certificate, in accordance with the requirements of the *Lands Clauses Act* (1), was obtained from Mr. *Selfe*, one of the magistrates of the police courts of the metropolis sitting at *Westminster*:—

"Whereas evidence has this day been adduced before me by the *Swansea Vale and Neath and Brecon Junction Railway Company*, incorporated by the *Swansea Vale and Neath and Brecon Junction Railway Act*, 1864, that the whole of the captital authorized to be raised by such Act, namely, £120,000, had been subscribed for, and that one-half of such capital had been actually paid up, I do hereby certify that the whole of the said capital of £120,000 has been subscribed for, and one-half thereof paid up. Given under my hand this 16th day of February, 1866.

"*H. S. Selfe.*"

On the 21st of April, 1866, a notice to treat was served upon the public officer of the Plaintiff company in respect of the land of the said Plaintiff company required by the *Junction Railway Company* for the purposes of their Act.

(1) By sects. 16 & 17 of the *Lands Clauses Consolidation Act* it is provided as follows:—

Sect. 16: "Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith in relation to the compulsory taking of land for the purposes of the undertaking."

Sect. 17: "A certificate under the hands of two justices, certifying that the whole of the prescribed sum has been subscribed, shall be sufficient evidence thereof, and on the application of the promoters of the undertaking and the production of such evidence as such justices think proper and sufficient, such justices shall grant such certificate accordingly."

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The *Junction Railway Company* having failed to raise sufficient capital for its line, which was a contractor's line, negotiations were entered into with the *Neath and Brecon Railway Company* in 1868, and a bill was introduced into Parliament for an amalgamation between the two companies. The Plaintiff company petitioned against this bill, and opposed it in committee. On the 26th of July, 1869, the *Neath and Brecon Railway Act* was passed, and thereby the *Junction Railway Company* was dissolved, and its undertaking was amalgamated with that of *Neath and Brecon Railway Company* (the Defendant company), which had been incorporated under and authorized by certain Acts of 1862 and other years, to construct certain railway works specified in such Acts; and by the Act of 1869 the Defendant company was made responsible for the fulfilment of all the liabilities of the *Junction Railway Company*, and claimed the right of executing all the works which the *Junction Railway Company* was authorized to execute, and to exercise all its privileges, including that of taking land for its undertakings.

By the 9th section of this Act the time for completing the works authorized by the Act of 1864 was extended for a period of three years from the time limited by the Act of 1864 for the completion thereof, but the Act did not purport to extend the period within which the compulsory powers given by that Act could be exercised, and did not give any fresh compulsory powers in that behalf.

No steps were taken by the *Junction Railway Company* prior to its amalgamation for the purchase of the land of the Plaintiff company, nor were any such steps taken by the Defendant company till January, 1871, when negotiations were entered into between the parties, and in the result the Defendant company took possession of the lands in question under their compulsory powers.

The Plaintiff company thereupon filed their bill against the Defendant company, praying that they, their contractors, workmen, and servants, might be restrained by injunction from continuing in possession of the land belonging to the Plaintiff company, and from taking or using any portion of the land without the consent of the Plaintiff company.

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The principal grounds on which the Plaintiff company relied were, first, that the period within which the compulsory powers to take land given by the Act of 1864 could be exercised had come to an end, and that neither the Plaintiff company nor any other company had any right at the time they took possession of the lands to take such lands; and, secondly, that notwithstanding the magistrate's certificate, the whole of the capital for the *Junction Railway Company* had not been subscribed within the meaning of the 16th section of the *Lands Clauses Act*, or at all, on the 21st of April, 1866, and that, therefore, the notice to treat given on that day was invalid.

Mr. *Southgate*, Q.C., and Mr. *Osler*, for the Plaintiff company:—

The first ground on which the Court is entitled to interfere by injunction in this case is because the compulsory powers given by the Act of 1864 having ceased on the 29th of July, 1867, and the time for completing the works on the 29th of July, 1869, abandonment by lapse of time must be presumed before the Defendant company took possession of the land. This is on the assumption that the notice to treat was valid.

In *Hedges* v. *Metropolitan Railway Company* (1) notice to take part of a property was given to a company ten days before the expiration of their compulsory powers, which was not followed up, but fourteen months afterwards the company gave notice to the landowner of their intention to apply to Parliament to abandon the undertaking. In this they did not succeed, and nineteen months after the notice they proceeded to take the lands: it was there held that the landowner was entitled to an injunction to restrain the company from taking possession of the property. That was a stronger case than the present.

In *Richmond* v. *North London Railway Company* (2), where a railway company, after the compulsory powers of their original Act had expired and the railway was opened for traffic, obtained another Act enabling them to take additional land, it was held, that under the circumstances the company could not take a piece of land under the compulsory powers of both Acts, the notice to treat having been given under the original Act.

(1) 28 Beav. 109. (2) Law Rep. 5 Eq. 352; Ibid. 3 Ch. 679.

Here we submit there was a clear abandonment, and the fact of the subsequent Act having been obtained, extending the time for the completion of the works, will not enable the Defendant company to take the land after such a lapse of time from the notice to treat.

Further, we contend that the notice to treat was invalid, inasmuch as the requisite capital was not subscribed. The Defendant company rely on the certificate of the magistrate, but that, though *primâ facie* evidence under sect. 17 of the *Lands Clauses Act*, is not conclusive, and is capable of being rebutted. The words of the section are, "A certificate under the hands of two justices certifying that the whole of the prescribed sum has been subscribed shall be sufficient evidence thereof, and on the application of the promoters of the undertaking, and the production of such evidence as such justices think proper and sufficient, such justices shall grant such certificate accordingly."

In *Barraclough* v. *Greenhough* (1) the words "sufficient evidence" in 20 & 21 Vict. c. 77, s. 64, were held to mean only *primâ facie* evidence; and we submit that they cannot be taken to mean more here.

There is no evidence in this case of a subscription contract having been entered into; and on this ground also, as well as on that of abandonment, we contend that the notice to take the lands cannot be put in force, and that the Plaintiff company is entitled to an injunction.

Mr. *Fry*, Q.C., and Mr. *Gardner*, for the Defendant company, were not called on.

SIR G. JESSEL, M.R.:—

I have a very clear opinion on this case.

The Plaintiff company is in the position of an ordinary landowner, being interested in land which a railway company appears to have taken possession of in the alleged exercise of the powers conferred upon it by Acts of Parliament. The Plaintiff company comes here for an injunction, founded, not on any equity properly so called, but on the well-established rule that a Court of Equity

(1) Law Rep. 2 Q. B. 612.

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will restrain by injunction any acts done by a railway company colourably under its powers, but not really authorized by such powers. That I take to be clearly established, and part of the law of this Court. In order to entitle this Court to interfere by injunction, I think it must be clearly shewn—it being a question of mere legal right—that the company is exceeding its powers, because if the Court abstains from interfering by injunction the landowner is not without remedy. His legal rights and remedies, whether by trespass or ejectment, remain if the company has improperly taken possession of the land; so that the only question is, whether the case is made out so clearly that the company is exceeding its powers that I am bound to prevent it by injunction from remaining in possession of the land. On the materials before me I am of opinion that I am not so bound, and that I ought not to interfere at all.

The first point made on behalf of the company was, that, assuming a notice to treat had been regularly and validly given, it had been rendered inoperative by lapse of time, which had operated as an abandonment.

The company was originally incorporated under an Act of Parliament of the 29th of July, 1864, and the notice to take the lands in question was given on the 21st of April, 1866. By the Act of Parliament there were three years given from the passing of the Act for exercising the compulsory powers of purchase, and therefore the notice having been given in April, 1866, was well given so far as that period was concerned; and five years were given for the completion of the works. Consequently, the question of abandonment could not well arise until July, 1869.

The railway was what is called a contractor's line. It was a perfectly *bonâ fide* railway company, but could not get the capital from the public in the first instance, so it was intended that the contractor was to take payment in shares and debentures, make the line, and when it was made and in working order it was expected that the public would come in and take the shares and debentures.

The company could not succeed in raising its capital, but in the year 1868 an arrangement was made with the *Neath and Brecon Railway Company*, by which the original company was amal-

gamated with the *Neath and Brecon Company*, and that company being in a position to raise the capital, undertook to make the line.

The Plaintiff company must be taken to have had notice of the intention to apply to Parliament to sanction the proposed amalgamation in 1868, or early in 1869, as it petitioned against the passing of the bill which contained an extension of the time for the completion of the works. The Petition was heard before a committee of the House of Commons in April, 1869. Notwithstanding the strenuous opposition of the Plaintiff company, the bill was passed into a law, and the time for completing the works was extended to the 29th of July, 1872. After the passing of the Act, in January, 1871, negotiations were entered into with the Plaintiff company, so that if there was no abandonment of the notice to treat by that time, it is admitted that it could not be got rid of afterwards.

Now I have been unable to follow the argument as to the notice to treat being got rid of by mere lapse of time. I do not say that no lapse of time will be evidence of abandonment. It must not be forgotten that the landowner can always force the company on; it is not as if it was all on one side, and the landowner may choose to do nothing, or may force on the company. But why should the company be considered to have abandoned its notice to treat? It was said in an old canal case, and properly said, that at law there is no limit as to the time of taking land; the company may take it at any time; it is the misfortune of the landowner to have such powers hanging over him. But it was on that very account that the Legislature fixed the time, and said, "You shall give your notice within a definite time, a notice binding on both parties." Then, if the notice is not proceeded with, the question arises, within what time can a company say it has not abandoned the notice? It was decided by my predecessor (Lord *Romilly*) in a case to which I have been referred, of *Richmond* v. *North London Railway Company* (1), that so long as the company had the power to execute its works, it could not be said to have abandoned its intention of taking the land, if it had given notice to take it in due time, and that

(1) Law Rep. 5 Eq. 352.

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so long as it still had power to execute the works, the landowner must know that the land might be wanted for that purpose. That decision was appealed (1), and as I understand the judgment of Lord *Cairns*, he distinctly desires it to be understood that he does not differ from the doctrine laid down by the Master of the Rolls, though he does not lay down the rule so absolutely. That being so, as there was no abandonment by lapse of time, certainly till the 29th of July, 1869, and as the landowners had actual notice that there was no intention to abandon, I follow that decision as affirmed on appeal in saying that the lapse of time in this case is not sufficient to nullify (for that is what abandonment means) the notice to treat.

The second point is one of more difficulty. The question is whether the notice to treat was valid; and that depends on the terms of the 16th and 17th sections of the *Lands Clauses Act*, which was incorporated in the usual way in the *Junction Railway Act* of 1864:—[His Honour then read the sections:—]

The question is, what those two sections, taken together, mean. I do not say that my decision would not be the same, whether I adopted the Plaintiffs' contention that the word "sufficient" meant *primâ facie* sufficient, or whether I rejected it. I think it would be the same in this particular case; but as the matter is one of importance—a matter of general interest—and affects other companies besides this, and having formed, in the course of the argument, an opinion upon the meaning of the section (though I do not consider it necessary in order to support my present judgment), I think it right to express that opinion. My opinion is that, taking the two sections together, and always excepting any question of fraud, as to which I desire it to be understood that I reserve my opinion, the certificate is intended by the Legislature to be conclusive on the landowner. It was not intended to allow every landowner on the line to decide the question as to whether sufficient capital had been subscribed. What was meant was this, that the Legislature would appoint a competent tribunal to decide that question, and that the certificate of that tribunal should be final, always assuming that it was obtained without fraud. That, I think, is the natural meaning of the two sections. The evidence

(1) Law Rep. 3 Ch. 679.

is to be sufficient for what? Sufficient evidence that the prescribed sum has been subscribed. Sufficient for what purpose? Sufficient for the purpose mentioned in the heading of the section —the purpose of "the purchase of lands otherwise than by agreement." Besides that, we find it is to be done on the application of the promoters of the undertaking, and the production of "such evidence as such justices think proper and sufficient." There, again, the word "sufficient" is used in its proper meaning—sufficient evidence to prove to the satisfaction of the justices that the fact is so. And that is a matter of right. It is a judicial tribunal, and it appears to me that to make the certificate binding conditionally is altering the words, which I have no right to do.

I need hardly mention that, by a subsequent Act of Parliament, in certain cases of which this is one, the certificate of a single stipendiary magistrate was substituted for that of the justices.

Now, that being the state of matters, the first contention raised before me was that the word "sufficient," in the absence of fraud, which is not alleged in this case, has the meaning which I will proceed to notice. The parties believed themselves to have obtained sufficient evidence, and obtained the usual certificate from the magistrate, who states precisely the evidence produced to him, and on that they proceeded to issue their notices; and I am told that, because they made a mistake (if they did make a mistake) as to the effect of certain documents, all that is to go for nothing. Now I was referred to a decision which, I was informed, decided that the word "sufficient" in an Act of Parliament meant *primâ facie* sufficient. The decision in question is a case of *Barraclough* v. *Greenhough* (1). On turning to that decision I find that, so far from so deciding that the word "sufficient" did not mean sufficient, all that the Judges decided was that in that case it meant sufficient to produce before the jury, the purpose not being expressed, and therefore was *primâ facie* evidence only. But they came to that conclusion, not on the wording of a section like this standing alone, but coupled with another section which stated what evidence should be conclusive in every case. They contrasted the word "conclusive" used in the one case with the word "sufficient" used in the other, and they came to the conclusion, on a compari-

(1) Law Rep. 2 Q. B. 612.

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son of the two sections, that the word "sufficient" was not used in the sense of "conclusive" as regarded that particular matter—a case, therefore, not necessarily applying to this case, like nineteen out of twenty cases cited on the construction of wills, when on the construction of a certain will, on certain words, Judges have come to the conclusion that those words have a particular meaning; and it is attempted to be proved that similar words—not the same words—must necessarily have the same meaning in another will. But of course that does not conclude the matter here, because I have now to examine whether, assuming the Plaintiffs to be right that the word "sufficient" is to be taken to be *primâ facie*, the *primâ facie* evidence produced has been completely destroyed.

Now, where an Act of Parliament makes a document *primâ facie* evidence of a fact, those who say it is not a fact at least must prove most clearly the negative; but in this case it is remarkable that, while the Plaintiff company allege at the Bar that there was no subscription contract, they have not produced a single bit of evidence in support of that assertion. On the other hand, there is the Act of Parliament itself, the 4th section of which clearly shews that there has been a subscription contract, for it incorporates the persons who had already subscribed to the undertaking, as well as those who should hereafter subscribe.

I am of opinion, from that recital, coupled with what we know of the practice of committees in those days, that there was a subscription contract, though I cannot tell what its contents were. There may be very good evidence of the contractor not having the slightest notion of paying for the shares—that he intended to take them in payment for the works—but there is no evidence whatever that certain persons, friends or nominees of the contractor, including probably the contractor himself, did not execute a proper subscription contract. Therefore, there being good *primâ facie* evidence that they did, and no evidence the other way, I am asked to say that the provisions of the Act of Parliament were not complied with. All I can say is, that is not my view of the province of a Judge. He is not to act on conjecture; he is not to imagine that parties did not take all those requisite steps which were absolutely necessary in order to justify their proceedings; and, in the absence of evidence in any way to rebut or control this

primâ facie evidence, I must, of course, give due weight to the *primâ facie* evidence. Therefore, if there were nothing more in the case, I should be compelled to hold, as I do hold, that all the necessary requisites were complied with.

That being so, the two objections, in my opinion, fail. The proceedings of the company were regular, and cannot, as I consider, be impeached. It only remains for me to dismiss this bill with costs.

Solicitor for the Plaintiff Company: Mr. *W. M. Hacon*, agent for Mr. *Charles Norton, Swansea.*

Solicitors for the Defendant Company: Messrs. *Dean & Taylor.*

SACKVILLE *v.* SMYTH.

[1873 S. 87.]

Will—Mortgaged Estate—Direction for Payment of Debts—Exoneration—Specific Devise—Locke King's Act (17 & 18 *Vict. c.* 113); 30 & 31 *Vict. c.* 69.

A testator, who was entitled to an estate subject to a mortgage, devised part of it for the benefit of his widow for life, and the remainder to his residuary devisee, and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate:—

Held, that no contrary or other intention was shewn within the meaning of *Locke King's Act*, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage.

Brownson v. *Lawrance* (1) questioned.

17 Eq 559
16 L.T. 463,

WILLIAM SMYTH, by his will, dated the 22nd of March, 1864, devised his mansion and all other his real estate to the use of the Plaintiffs; as to his mansion, in trust to permit his wife, during her life or widowhood, to reside in, occupy, and enjoy it, but not to let or demise the same; and as to his said mansion, subject to the said trust for the benefit of his wife, and as to all other his real estate, subject to his mother's jointure and as therein mentioned, upon trust for his brother, *Christopher Smyth*, for life, with remainder to his nephew *Christopher* for life, with remainders over. And the testator thereby gave the trustees a power of sale and exchange over the real estate thereby devised, except the mansion,

(1) Law Rep. 6 Eq. 1.

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and directed that the trustees should apply the moneys to arise by such sale, or to be paid for equality of exchange, towards the discharge of incumbrances. And the testator gave divers legacies, and bequeathed his residuary personal estate, subject to the payment of his debts and funeral and testamentary expenses, to his brother *Christopher;* and provided that, in case his residuary personal estate should be insufficient to pay his debts and funeral and testamentary expenses and legacies, then and in such case all his real estate, except his mansion, should be charged with the payment of the same debts, funeral and testamentary expenses, and legacies, as his residuary personal estate should be insufficient to pay; and he authorized his trustees to borrow any sum of money which might be required to make up such deficiency on the security of his real estate, except his mansion, by way of mortgage.

The testator died in March, 1872. At the date of the will the mansion and parts of the real estate were subject to certain mortgages, which were paid off in May, 1865, out of a sum of £20,000 then raised by the testator by a mortgage of the 29th of May, 1865, of the mansion and other hereditaments. The last-mentioned mortgage debt was subsisting at the time of the testator's death.

The bill, to which the son and nephew and widow were Defendants, prayed that it might be determined and declared whether, under the 17 & 18 Vict. c. 113, and the Acts amending the same, the lands and hereditaments comprised in the said mortgage security, dated the 29th day of May, 1865, were, as between the persons claiming through or under the testator, primarily liable to the payment of the said mortgage debt of £20,000 and interest, or whether, as between such persons, the personal estate of the testator not specifically bequeathed, and not applied or applicable in payment of the testator's funeral and testamentary expenses and debts (other than the said mortgage debt), ought to be applied by the Plaintiffs, so far as the same would extend, in reduction of the said mortgage debt and interest in exoneration of the said devised estates and hereditaments.

Mr. *Fry*, Q.C., and Mr. *Chapman Barber*, for the Plaintiffs.

Sir *R. Baggallay*, Q.C., and Mr. *Chapman Barber*, for the testator's brother, *Christopher Smyth.*

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Mr. *Southgate*, Q.C., and Mr. *Borrett*, for the testator's widow:—

The testator's mansion-house is specifically devised in trust for the benefit of the widow during her life or widowhood; the rest of the real estate goes under the residuary devise. This is a sufficient indication that the part of the estate specifically devised shall not be primarily liable to the payment of the mortgage debt, even if the will had not contained a direction to pay the debts out of the residuary personal estate, and that they should be charged on the residuary real estate in case the personalty should prove deficient.

In *Brownson* v. *Lawrance* (1), where the owner of an equity of redemption specifically devised one estate and left the other to pass by a residuary devise, it was held by Lord *Romilly* that he thereby signified a "contrary or other intention" within the meaning of *Locke King's Act*, so as to make the estate which passed by the residuary devise primarily liable for the whole of the mortgage debt.

We submit, therefore, that the widow's life interest in the mansion-house should be exonerated from the payment of the proportionate share of the interest on the mortgage.

Mr. *Whitehead*, for *Christopher Smyth*, the testator's nephew.

Sir G. Jessel, M.R.:—

I can find in this will no contrary or other intention within the meaning of the exception in *Locke King's Act*. It has been enacted that a general direction for payment of debts out of personal estate shall not be deemed to exonerate mortgaged properties, and what is there in this case to take it out of the general rule? If I were to decide otherwise, I should have to hold that every devise of a life interest in real estate was an expression of a contrary intention. It does not appear to me that *Locke King's Act* was intended to apply as between specific and residuary devises in the way it was held to apply in *Brownson* v. *Lawrance*.

Solicitors: Messrs. *Markby, Wilde, & Burra*; Mr. *G. H. Fisher*.

(1) Law Rep. 6 Eq. 1.

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Dec. 13.

In re NETHER STOWEY VICARAGE.

Land Tax—Redemption—Sale of Lands—Investment of Surplus—Proceeds of Sale—Repairs and Improvements—42 Geo. 3, c. 116, s. 100.

10 Ch 366

The *Land Tax Redemption Act* (42 Geo. 3, c. 116), s. 100, provides that surplus moneys arising from a sale made to redeem land tax may be applied in the discharge of any debt affecting the hereditaments, the land tax whereon shall have been redeemed, or may be invested in the purchase of other lands to be settled to the like uses:—

Held, that where a portion of the glebe lands of a vicarage had been sold to redeem the land tax, the surplus moneys could not be applied towards repairs and improvements of the vicarage house.

IN 1797 part of the glebe lands of the Vicarage of *Nether Stowey* were sold for the purpose of redeeming the land tax. After this object had been effected a surplus remained, which had, pursuant to the Land Tax Acts, been invested in consols and transferred into Court, and the dividends thereon had been paid to the successive vicars of the parish.

The present vicar now presented a Petition, stating that he had expended £300 of his own moneys in repairing the vicarage house and increasing the accommodation thereof; that such alterations had been made with the sanction of the bishop of the diocese and the patrons of the living, and while increasing the healthiness and comfort of the house would not tend to make it more expensive to live in or more burdensome than formerly to the vicar; and praying that he might be recouped the £300 out of the fund in Court.

By the statute 42 Geo. 3, c. 116, s. 100, surplus moneys arising from a sale, mortgage, or charge made for the purpose of redeeming land tax, may be applied, under the direction and with the approbation of the Court of Chancery, "in the discharge of any debt or debts, or parts thereof, affecting the manors, messuages, lands, tenements, or hereditaments, the land tax charged whereon shall have been so redeemed, or where the same shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation, in the purchase of other manors, messuages, lands, tenements, and hereditaments which shall be conveyed and settled to, for, and upon such and the like uses

trusts, intents and purposes, and in the same manner, as the manors, messuages, lands, tenements, and hereditaments which shall be so sold, mortgaged, or charged as aforesaid stood settled and limited, or such of them as at the time of making such conveyance and settlement shall be existing undetermined and capable of taking effect."

Mr. *Badcock*, for the Petition, stated that there was no reported case in which such an application had been sanctioned under the Act 42 Geo. 3, c. 116; but similar applications had been sanctioned under the *Lands Clauses Consolidation Act*, 1845, the terms of which did not materially differ from the Act under consideration. Thus, in the case of *Re Incumbent of Whitfield* (1), the money paid in under the *Lands Clauses Act* had been applied in building a new vicarage house. In *Ex parte Rector of Shipton* (2) the purchase-money of a portion of glebe land taken under the *Lands Clauses Act* was laid out in erecting farm buildings on the remainder. In *Ex parte Rector of Welbourn*, before Lord *Romilly* on the 18th of April, 1868, the purchase-money for glebe land taken by a railway company was applied in rebuilding the rectory house.

Mr. *Fischer*, Q.C., for the patrons of the living, supported the application.

SIR G. JESSEL, M.R., said that the Act of Parliament under which the present application was made was perfectly plain. The fund might be laid out either in discharging incumbrances affecting the land or purchasing other lands, but the present application was for neither of those purposes. As to the cases cited, it was doubtful how far they could be treated as binding authorities, having regard to the cases of *Re Dummer's Will* (3) and *Brunskill* v. *Caird* (4); but at all events they were decisions under another Act of Parliament, and, moreover, only shewed that the Court had sanctioned the expenditure of money in erecting new buildings, whereas the present application was merely to sanction repairs of an old building. The Petition must be dismissed.

Solicitors: Messrs. *Vizard, Crowder, & Co.*

(1) 1 J. & H. 610. (3) 2 D. J. & S. 515.
(2) 19 W. R. 549. (4) Law Rep. 16 Eq. 495.

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UNITED LAND COMPANY *v.* GREAT EASTERN RAILWAY COMPANY.

[1872 U. 14.]

Railway Company—Right of Way—Level Crossing—Effect of Change in Condition of Land.

A railway company taking land compulsorily contracted to make communications by level crossings between two severed portions of an estate. The estate then consisted of marsh or mud land, and was subject to a statutory prohibition against being built upon. The prohibition having been afterwards removed, and the land becoming applicable for building purposes:—

Held, that a right of way over, under, or across a railway was *primâ facie* general, and not restricted to purposes to which the land was applicable at the time the right arose, and the right being unrestricted in terms gave the owners and occupiers of the land the use of the level crossings for all purposes connected with houses or buildings subsequently erected or to be erected on the estate, but not so as to obstruct the proper working of the railway.

THIS was a suit instituted for the purpose of obtaining an injunction to restrain the *Great Eastern Railway Company* from obstructing the Plaintiff company in using certain level crossings over their line at *Harwich*.

In the year 1847 the *Eastern Union Railway Company*, afterwards absorbed by the *Great Eastern Railway Company*, were empowered to make a railway from *Manningtree* to *Harwich*.

At or near *Harwich* the company were empowered to carry their line over certain land of Her Majesty, then forming part of the bank and foreshore of the river *Stour*, which was of a marshy character, and used only for the purpose of grazing cattle. The land had originally been acquired under an Act of Parliament in the reign of Queen *Anne* for the purposes of defence, and, as being within the range of a fort then existing, was subject to a statutory provision against being built upon.

The Act under which the railway was made contained, by sect. 19, the following provision: "And be it enacted, that it shall not be lawful for the said company to make any deviation from the main line of the said railway, as laid down in the plans herein

mentioned or referred to, through the lands of Her Majesty, without the previous consent in writing of two of the Commissioners for the time being of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, first had and obtained, any line of deviation shewn on the said plans or otherwise to the contrary notwithstanding; and the said company shall, and they are hereby required, at their own costs and charges, to make and construct such convenient communications across, over, or under the said railway, where it shall be carried through or over the lands of Her Majesty, as shall, in the judgment of the Commissioners for the time being of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, be necessary for the convenient enjoyment and occupation of the lands of Her Majesty, and such communications when so made shall at all times be kept in good order and repair by and at the expense of the company."

The railway company, being desirous of carrying out their works, entered into an agreement with the Crown, represented by the Commissioners of Woods, Forests, and Land Revenues, which was dated the 25th of February, 1854, which, after determining the price to be paid for the land, contained the following clause:—

"The said company shall and will at their own expense well and sufficiently execute the following works to the satisfaction of the said *Charles Alexander Gore*, or other commissioner or commissioners for the time being: Four level crossings at the points marked respectively with the letters A, B, C, and D on the said plan, with proper approaches thereto from the lands on the other side thereof, the crossings at the said points A, C, and D to be thirty feet in clear width, and the crossing at the said point B to be twenty feet in clear width."

This agreement was carried into effect by a conveyance dated the 23rd of May, 1865.

The railway was made and opened for traffic, and the level crossings provided for by this agreement were constructed in accordance therewith, except that the width of the openings was something less than had been agreed upon.

By a deed of the 2nd of May, 1866, an agreement was entered into between Mr. *Gore*, as Commissioner of Woods, Forests, and

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Land Revenues, on the part of the Crown, and a company called the *Harwich Harbour Company*, for the sale to the *Harwich Harbour Company* of part of the Crown lands between the railway and the river, conditionally on an Act being obtained by the company, which they were then applying for and afterwards obtained under the title of "*The Harwich Harbour* (*Reclamation of Land*) *Act*, 1866," and the deed provided for the use by the company of two roads crossing the railway by two of the level crossings constructed by them under the agreement of the 25th of February, 1854.

The *Harwich Harbour Company* were unable, in some particulars, to complete the last-mentioned agreement, and by an indenture of the 1st of November, 1871, their rights and interests in the contract with the Crown were vested in the Plaintiff company. The statutory prohibition against building on this land having been removed, it had been, previously to the execution of this deed, laid out in building plots by the *Harwich Harbour Company*, and a number of plots had been taken and a considerable number of houses had been built thereon, and others were in course of building. The roads in question, with the level crossings, formed the only means of communication for the occupants of the houses with the rest of the country.

The railway company, however, objected to the use of the level crossings by the tenants of the houses, and on the 1st of December, 1871, they sent to the secretary of the Plaintiff company a notice, signed by their solicitor, in the following words:—

"The attention of the directors of the *Great Eastern Railway Company* has been called to a prospectus or notice headed '*Harwich Estate, Essex* (*East*), close to the *Great Eastern Railway Station*, Freehold Building Plots,'—intimating the offer by the '*United Land Company* (*Limited*)' to purchasers of freehold building plots of land adjoining the *Great Eastern Railway* at *Harwich*, and also to a sketch plan presumably referred to in such prospectus or notice. The plan shews two level crossings from the *Dovercourt Road*, on the easterly side of the railway, to two intended new streets on the westerly side of the railway, to be constructed in connection with the laying out of the land on the said westerly side for building purposes. The notice also intimates that two of the streets 'will form a direct communication between the *Bath Side*

and the *Dovercourt Road*.' I am instructed to give you notice that the *Great Eastern Railway Company* will not permit the level crossings aforesaid to be used by the owners or occupiers of any houses to be erected on the said land on the westerly side of the railway."

The railway company also put up the following notice at one of the crossings:—"*Great Eastern Railway*. Take notice that there is no Public Thoroughfare on the crossing. By Order.—*J. B. Owen*, Secretary."

The present bill was then filed by the Plaintiff company, praying for a declaration of the right of themselves, their tenants, and under-lessees and occupiers of the messuages, land, and hereditaments so purchased by them, to the free and uninterrupted use and enjoyment of the level crossings, and each of them, and for a consequential injunction.

The bill alleged that the railway company had caused obstructions by allowing loaded trucks to remain an unreasonable time on the crossings, and evidence was given in support of these allegations.

The Plaintiff company moved for an injunction, but by arrangement the motion stood over till the hearing on motion for decree, on which the cause was now heard.

Mr. *Cotton*, Q.C., and Mr. *Townsend*, for the Plaintiff company:—

This case must be treated just as if the Crown were still the owner of the land on both sides of the railway. The Plaintiff company stand in the position of having bought this land, with all the rights of access to it which the Crown might have used. There is no restriction in the terms of the contract as to the use which the Crown may make of the level crossings, and the purchasers from the Crown are entitled to the use of them, either by themselves or by the occupiers of houses built upon the land, as a means of communication between the portions of land on both sides of the railway.

Some cases will probably be referred to which go to the point, that where there is a right of way by prescription, the right is

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restricted to that kind of user to which the prescription extends. Just as where there is a footway by prescription, a right to use it as a carriage way or horse way cannot be gained. But these cases rest upon prescription, and not upon grant or contract.

There are also some cases depending upon grant, which may seem at first sight in favour of the Defendants. Such as where a right of way is granted to a particular house, and it cannot be used for any other house. But that is because the right of way is in terms granted for that particular house. Two such cases are referred to in *Gale* on Easements (1). One is *Allan* v. *Gomme* (2), where a grant of a right of way to a shed was held not to give a right of way to a cottage built in lieu of the shed. But Baron *Parke*, in *Henning* v. *Burnet* (3), the other case referred to, said he did not concur to the full extent in the doctrine laid down in *Allan* v. *Gomme*. There is also the case of *Williams* v. *James* (4), in which even a prescriptive right of way to a field was held to imply the right to cart hay stacked in the field, which had been grown partly in adjoining land to which the right did not extend.

10 Ch. 584.

[The VICE-CHANCELLOR:—Another principle is apparently applicable to the case, that a grant must be taken most strongly against the grantor. This was the ground of the decision in *South Metropolitan Cemetery Company* v. *Eden* (5).]

No suggestion of inconvenience to the public by interference with the traffic can be set up as a reason for not performing the contract made by the company: *Raphael* v. *Thames Valley Railway Company* (6).

Mr. *Pearson*, Q.C., and Mr. *Smart*, for the *Great Eastern Railway Company*:—

At the time this land was taken by the railway company it was subject to a statutory prohibition against being built upon, being in fact required to be kept free from buildings for the purpose of the defence of the country. And whatever rights were conferred upon the *Harwich Harbour Company* were given them subject to this provision, and must be considered with reference to its

(1) 3rd Ed. p. 291.
(2) 11 A. & E. 759.
(3) 8 Ex. 187.
(4) Law Rep. 2 C. P. 577.
(5) 16 C. B. 42.
(6) Law Rep. 2 Ch. 147.

existence. Bearing this in mind, it is evident that the only means of communication which could be contemplated were such as were required for the use of the tenants of the waste or grazing lands on both sides of the intended railway. The level crossings were in fact merely accommodation crossings. There is a great difference between a public road and a private accommodation road. But there is no difference in principle between a right of road by grant and one by prescription, because prescription presupposes a grant. The only difference is, that where there is a grant the instrument creating it is construed like any other deed, but in the case of a prescription the grant is supposed to be lost.

Now the authorities determine that when there is a grant, its nature and extent depend upon the circumstances of the case. In *Cowling* v. *Higginson* (1) Lord *Abinger* put the case by way of illustration, that if a road lay through a park, the jury might naturally infer the right to be limited, but if it went over a common, that it was a way for all purposes. So in *Ballard* v. *Dyson* (2) it was held that there might be a grant of a right of way to pass with horses and carts, but not with other kind of cattle.

Here, in the first place, all that was contemplated by the Act under which the railway was constructed, was the making of communications between the severed portions of the Crown land, and the Plaintiff company cannot entirely change the character of the land and then say that the communications required to be made for the old condition of the land may be used for it in its altered state. There is no suggestion in the Act of the possibility of these private occupation crossings being turned into public highways. The word "communications" must be understood in the same sense in which it is used in sect. 74 of the *Railways Clauses Act*, 8 Vict. c. 20.

The extent of the grant is determined by the occupation and enjoyment of the land at the time when the level crossing was made: *Williams* v. *James* (3). So, also, in *Ballard* v. *Dyson*. In *Dand* v. *Kingscote* (4), also, a right of way was held to be strictly limited to the purpose for which it was granted, and the question was even raised, though not actually determined, whether

(1) 4 M. & W. 245.
(2) 1 Taunt. 279.
(3) Law Rep. 2 C. P. 577.
(4) 6 M. & W. 174.

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a way-leave to a coal mine could be used by means of a railway. *Reg.* v. *Brown* (1) is a distinct authority for the proposition that communications made for agricultural purposes must be strictly limited to those purposes. *Allan* v. *Gomme* (2) is also a distinct authority to the same effect, and was not overruled merely by a *dictum* of Baron *Parke* in *Henning* v. *Burnet* (3). Having regard to the circumstances of this case, *Cowling* v. *Higginson* (4) and *Williams* v. *James* (5) are expressly in point.

Mr. *Cotton* commenced his reply, but was stopped by the Court.

SIR R. MALINS, V.C.:—

The point raised by this case is one of great importance to the Plaintiffs, who are, as I understand, a building company, and also to the *Great Eastern Railway Company*, who say that the rights claimed by the Plaintiffs, if they exist, will cause great inconvenience to them. A question of very considerable importance, as I think, to the public in general, but at all events to landowners, is also raised, as to what is the effect of having a communication under, over, or across a railway. It happens in this case that the question relates solely to a communication across the railway called a level crossing.

The question arises in this way: The *Great Eastern Railway Company*, under that general name, has absorbed several other companies. In the year 1847 the *Eastern Union Railway Company*, having a railway from *London* to *Manningtree*, obtained the Act, which has been so much referred to, empowering them to make a railway from their line at *Manningtree* to *Harwich*. For this purpose it was necessary to take certain lands belonging to the Crown. How they had become vested in the Crown it is unimportant for me to consider, because it is the common case of both parties that the Crown at this time, or at all events subsequently, had the power to alienate these lands. It is, as we all know, in general necessary that a railway company should have powers of deviation, but this Act contains some restrictions upon

(1) Law Rep. 2 Q. B. 630.
(2) 11 A. & E. 759.
(3) 8 Ex. 187.
(4) 4 M. & W. 245.
(5) Law Rep. 2 C. P. 577.

this power. The company is restricted with regard to the Crown lands in a manner in which it is not restricted with regard to other lands.

[His Honour then read the 19th section of the Act, and continued:—]

The communications required to be made are to be "such as shall, in the judgment of the commissioners for the time being, be necessary for the convenient enjoyment and occupation of the lands of Her Majesty;" and such communications were made.

Now, when the future enjoyment of land is spoken of it is not usually meant that it is to be enjoyed in the precise mode or for the precise purpose for which it is used at the present time, but in any manner that subsequent events may render expedient. Nothing can, in my opinion, be more narrow than the attempt to put upon the language of this Act of Parliament the construction, that because the land was used in a particular manner at that time it must necessarily be used in the same manner for all future time, or actually be blocked out from all communication with the outer world. My opinion is that the meaning of the Act of Parliament is, that there was to be such communication made as should be, as far as practicable, consistent with the existence of the railway on the land, and would render it as enjoyable and as free to be used as if the railway had not been constructed at all. That, indeed, is the object of all railway legislation. Necessarily, railways cannot be made without invading the rights of private individuals. Therefore all persons are bound to submit their rights to the public, and those who are most reluctant to part with their property are obliged to do it compulsorily by Act of Parliament. But at the same time that the Legislature throws upon individuals the obligation of parting with their land, it protects them, as far as possible, by obliging the company taking it for the purpose of constructing the railway to make such communications as shall either be agreed upon or be prescribed by the particular Act of Parliament, or be settled by the tribunal appointed for the purpose. Therefore when one part of an estate is severed from another by a railway, it is always a condition that sufficient communication shall be made, either over the railway by a bridge, under the railway by an arch, or across it by a level crossing. But I appre-

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hend that whatever be the mode of communication, the object is, that the rights of the landowner shall be in no way prejudiced, except so far as is required for the actual construction of the railway. He is to have as much enjoyment and as free use of his land after the railway is constructed as he had before, so far as the exercise of those rights does not interfere with the rights of the railway company and the rights of the public in running over the lands upon the railway.

Now, this condition being imposed on the company, they took the land, and the period arrived when it was necessary for them to agree with the Crown as to the price to be paid for it. That contract is entered into by an instrument, which has been referred to, of the 25th of February, 1854. Now this is, as I understand, land which had been to a certain extent reclaimed; some of it was mud land, which at that time it was thought highly improbable would ever be built upon. But the changes are so great in the condition of land that in the course of a few years it might turn out quite the contrary. At all events this land was vested in the Crown, and the Crown had a right to turn it to the greatest possible advantage.

When the price of land is settled as between a landowner and the railway company, there are two things to be considered: first, the absolute value of the land taken, and secondly, the damage by severance. The damage by severance is frequently greatly mitigated by the nature of the communications which are made between the two portions of the land severed by the railway. If the land is so situated that a level crossing can be conveniently made, the damage by severance is comparatively small, and so also if there can be a cattle creep or an arch. But if the circumstances are such that no communication can be made, the amount of the damage is greatly increased. The nature of the communication, therefore, forms a consideration in assessing the damage by severance, and in this case, if convenient communications could be made, the price to be paid to the Crown for the land would be diminished. All this is taken into consideration in the contract of the 25th of February, 1854. [His Honour then read the clause of the agreement above set forth, and continued:—]

Now it is, I think, perfectly plain that if the parties had con-

templated that this land was to be used merely for the purpose of agricultural land, it would have been wholly unnecessary to require that the crossings at three places should be thirty feet, and at the other twenty feet wide; because for the largest waggon used on a farm no such width could be required, and these dimensions would be utterly useless unless the parties contemplated that this land might at some future period be used for building purposes.

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Then it has been argued very strenuously, that when a right of way is granted for one purpose it cannot be used for another. I quite agree. The law is perfectly settled that if one man has a right of way over the land of another to go to a particular place, he cannot use it for the purpose of going to that place and a place beyond it, because the servient tenement is only subject to a certain use and a certain inconvenience. He has agreed that it shall be used for a particular purpose, and having so agreed, he is not bound to submit to its being used for any other purpose.

But this is not the case of a servient tenement. I cannot look upon the railway as the servient tenement. The question is, what is the effect of land being taken by a railway company? I say again it is an inconvenience to which the landowner is bound to submit, but to which he does submit upon terms of making the best bargain he can with regard to the price, and the communications; and when he, or the Legislature for him, has settled what those communications are to be, I apprehend the true view of the case is, that the owner has the most unlimited power of using the land on either side for any purpose to which it may be expedient at any time, however distant, to apply his land.

So, even if it were the common case of private use, I should entirely concur in the views expressed by Mr. Baron *Parke* in *Henning* v. *Burnet* (1). It is very true, as Mr. *Pearson* says, that this *dictum* does not overrule *Allan* v. *Gomme* (2); but the opinion he expresses is supported by the late Lord Chief Justice *Bovill* in *Williams* v. *James* (3), in which both he and Mr. Justice *Willes* laid down the same rule, that the right of going to land, unrestricted as to purpose, is a right to go to it for any purpose whatever. If, therefore, this were to be regarded as a question of

(1) 8 Ex. 187. (2) 11 A. & E. 759.
(3) Law Rep. 2 C. P. 577.

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right of way over the land of an individual, the purpose being unrestricted, the right to the level crossing would carry with it the right of using it for the purpose of going to buildings afterwards erected on the land.

Now, this being the contract, it is carried into effect by a conveyance executed by the railway company, dated the 23rd of May, 1865. The only material circumstance there is, that it is clear there is no recital of the fact of the works having been constructed, but the contract itself shews very distinctly that they had been constructed, because the company covenant to maintain and keep in good repair and condition the several works lately constructed by them on and adjacent to the said land which comprise those mentioned in the agreement. Then the level crossings have been made, and though it appears that they are not of the dimensions required by the contract of 1854, I understand the Plaintiffs to make no complaint on that ground, and all that I conceive they are entitled to is the maintenance of the level crossings as they existed in 1865.

Upon these grounds it appears to me that, on principle as well as upon contract, the Plaintiffs are entitled. It appears so to me, upon the broad principle, that the Crown had the right to use the land for any purpose to which it could by possibility be applied, and the obligation to construct these level crossings was an obligation to make such communications as would enable those who should erect buildings on these lands to use them for the purposes of those buildings, and I am of the same opinion upon the contract between the parties.

Then the railway company say that this will be inconvenient. But they were bound to anticipate the inconveniences, and if their object was to have a restricted use, they should have contracted for it.

[His Honour then referred to the evidence on the question of inconvenience, and concluded that it amounted merely to statements of the opinions of the contractors, unsupported by facts, and continued:—]

I believe in this case the level crossings can be used with advantage to all occupiers of the houses now built, or proposed to be built, on this land, without injuring the interests of the railway

company, and that in experience that will be found to be so. But that is a matter into which I cannot now enter.

I am therefore of opinion that the Plaintiffs have established their right to the declaration they ask for, with the addition of the words, "but not so as to obstruct the proper working of the railway."

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Solicitors: Mr. *Henry Smith*; Mr. *W. H. Shaw*.

In re LIMEHOUSE WORKS COMPANY.

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Company—Contract to take Shares—Memorandum of Association—Collateral Agreement—Payment in Money's Worth—Companies Act, 1867, *s.* 25.

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The 25th section of the *Companies Act*, 1867, has not altered the law with regard to the question of what is a good payment for shares.

The memorandum of association of a company formed for the purpose of purchasing and carrying on the business of *C.* was subscribed by him for 2500 shares, which were of £1 each. It was also subscribed by other persons, by which the number taken amounted to 6265 out of a total capital of 7500 shares; and the company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between *C.* and the company for the sale of the business to the latter for £5000, of which one-half was to be in fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the Registrar of Joint Stock Companies. As between *C.* and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase-money, and he was debited in the books with £2500 due on the shares, and credited with £5000 as the price of the business:—

Held, that *C.* was entitled to treat the shares for which he subscribed the memorandum as the same shares as those for which he sold his business, and that the shares were paid for in cash within the meaning of the 25th section of the Act of 1867.

Fothergill's Case (1) and *Spargo's Case* (2) considered.

THIS was a motion by the official liquidators of the *Limehouse Works Company, Limited*, seeking to place Mr. *Ezra Jenks Coates*

(1) Law Rep. 8 Ch. 270. (2) Law Rep. 8 Ch. 407.

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on the list of contributories for 2500 shares in the company, for which he had signed the memorandum of association.

The objects of the company as stated by the memorandum of association were the purchase and carrying on of certain businesses formerly carried on by Mr. *Coates* at the *Limehouse Works*, No. 7, *Oak Lane, Limehouse*, under the styles of the *London White Lead and Zinc Company*, the *London Wool Works*, and the *Limehouse Works;* and it was provided that the capital of the company should be £7500, divided into 7500 shares of £1 each.

The memorandum of association was signed by Mr. *Coates* for 2500 shares, by three persons for 1250 shares each, and by three other persons for five shares each.

No. 4 of the articles of association, after stating that an agreement had been prepared between Mr. *Coates* of the one part, and the company of the other part, for the purchase by the company of Mr. *Coates*' businesses, and that the company were to pay a rent of £500 a year for the business premises, with an option of buying Mr. *Coates*' interest therein for £500, continued as follows:—"The purchase-money payable to the said *Ezra Jenks Coates* for the said businesses and plant under the said agreement is £5000, of which one moiety is to be paid in cash and the other moiety in fully paid-up shares of the company."

Articles 5 and 6 were as follows:—

"5. The capital of the company is £7500, divided into 7500 shares of £1 each. The written application of any person for shares shall be deemed his acceptance of the shares (if any) allotted to him; but, except as aforesaid, no person shall be deemed to have accepted any shares in the company unless he shall have testified his acceptance thereof by writing under his hand; or in case any form of acceptance shall, for the time being, have been appointed by the company, then in such form.

"6. The deposit to be paid on subscribing or applying for any shares in the company (other than the shares to be allotted under the agreement between the said *Ezra Jenks Coates* and the company) shall be the sum of 5*s.* in respect of each share, and the amount to be paid by the allottee on the allotment of any shares in the company shall be the sum of 15*s.* in respect of each share; and immediately on the inscription of the name of the

allottee in the register of members as the name of the holder of any shares, the said sum shall become a debt due to the company, and shall be paid by him accordingly."

By article 31 the company was authorized by special resolution to increase the amount of the capital by the creation of new shares.

The memorandum and articles of association were dated the 28th of September, 1870, and were registered at the same time.

The agreement referred to in the 4th article of association was dated the 30th of September, 1870. Article 2 was as follows:—

"The aggregate consideration or purchase-money to be paid or given by the company for the said businesses and premises hereinbefore contracted to be sold shall be £5000, whereof one moiety, or the sum of £2500, shall be paid to the vendor in cash by the following instalments, viz., the sum of £625 to be paid upon the execution of these presents, and the sum of £625 to be paid within fourteen days after the date hereof, and the sum of £1250 to be paid within two calendar months after the date hereof, and the other moiety or sum of £2500 shall be paid or given to the vendor in 2500 fully paid-up shares of £1 each in the company; and the company shall forthwith, upon the execution of these presents, allot to the vendor the said number of fully paid-up shares in the company, and the vendor shall accept the same in satisfaction of the said moiety of the said consideration or purchase-money."

Written applications were then sent in by all the persons who had signed the memorandum of association, except Mr. *Coates*, for the number of shares for which they had subscribed, together with the amount of 5*s.* upon each of such shares; and at a meeting of the directors on the 30th of September, 1870, resolutions were passed and entered in the minute book allotting the shares for which the written applications had been sent in, and directing the manager and secretary to send to the allottees notices of the allotments, and to request them to pay the remaining 15*s.* per share due upon the shares allotted.

At the same meeting the agreement between Mr. *Coates* and the company was approved of, and on the 6th of October it was filed with the Registrar of Joint Stock Companies.

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Another meeting of the directors took place on the 10th of October, 1870, at which the following resolution was passed and duly entered on the minutes:—

"That 2500 fully paid-up shares of £1 each in the company be, and the same are hereby allotted to *Ezra Jenks Coates*, in pursuance of the contract between the said *Ezra Jenks Coates* and the company, and bearing date the 30th day of September, 1870, the said shares being the same for which the said *E. J. Coates* subscribed the memorandum and articles of association."

On the 23rd of January, 1871, 750 additional shares were taken up by one of the parties who had signed the memorandum of association, so that in the result 7015 shares out of the total capital of £7500 were appropriated.

The capital account of the company, as made out to the 30th of June, 1872, shewed £2500 entered on the credit side as having been received from Mr. *Coates* on the 10th of October, 1870, though he never in fact paid anything in cash. The cash account credited him on one side with £5000 for the sale of his business, and debited him on the other side, under the date of the 11th of October, as follows:—"To 2500 fully paid-up shares, £2500." He was also debited with the instalments of the cash payments which were made for his business, and a balance was struck in his favour for the amount remaining unpaid.

No other shares than those for which Mr. *Coates* signed the memorandum of association were ever allotted him, and no resolution was ever passed for increasing the capital of the company, and there never were, after the registration of the company, 2500 shares unallotted.

The company having gone into liquidation, it was now sought to place Mr. *Coates* on the list of contributories for the 2500 shares in respect of which he had signed the memorandum of association.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, in support of the motion:—

By signing the memorandum of association Mr. *Coates* bound himself to take up and pay for, in the regular way, the shares for which he subscribed, and nothing in the articles of association can

affect his liability: *Dent's Case* (1). He cannot discharge his liability by a subsequent agreement for the sale of his business to the company. The creditors had a right to look to the memorandum of association as indicating the number of shares which had been taken up. The circumstances of this case are exactly the same in principle as those in *Fothergill's Case* (2). If the company had been a success, Mr. *Coates* would have had a right to an allotment of an additional set of 2500 shares; and the fact that a fresh issue of shares would have been required to supply the requisite number is immaterial where there is power to make a fresh issue of shares: *Evans' Case* (3).

Mr. *Cotton*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Methold*, for Mr. *Coates*:—

This case comes within the principle of *Spargo's Case* (4), and is distinguishable from *Fothergill's Case* on the same grounds. In *Fothergill's Case* there were two entirely distinct contracts, and it was sought unsuccessfully to connect them together. Here and in *Spargo's Case* there is really only one transaction. By the articles of association, the agreement between the company and Mr. *Coates* is made binding on the company, and it must have been evident to any one dealing with the company that the contract could only be completed by treating the shares for which Mr. *Coates* signed the memorandum of association as the same which he took as part of the price of his business; because the articles of association provided that the capital could only be increased by special resolution, and there was otherwise no sufficient balance of shares available. Moreover, the accounts and dealings of the company have always been on the footing that these were fully paid-up shares. The directors had power in *Evans' Case* to make a further issue of shares, and it appears from the report that if there had been no available shares the decision would have been the other way. There is no case in which a man has been put on the list of contributories in respect of non-existent shares.

It is now quite settled that the Act of 1867 does not prevent any one from paying for shares for which he signs the memo-

(1) Law Rep. 8 Ch. 768.
(2) Ibid. 270.
(3) Law Rep. 2 Ch. 427.
(4) Ibid. 8 Ch. 407.

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randum of association by giving property or goods to the company in exchange: *Maynard's Case* (1). Under the old law it was perfectly clear: *In re Baglan Hall Colliery Company* (2); *Schroder's Case* (3); *Cleland's Case* (4); *Sichell's Case* (5); *Jones' Case* (6).

Mr. *Glasse*, in reply:—

The sole question is, whether Mr. *Coates* has fulfilled the obligation into which he entered by signing the memorandum of association. This must be determined by considering the state of circumstances at the time the memorandum was signed. At that time there was not a single share allotted, and no subsequent arrangement can affect the rights of the parties. The question is, whether there has been such a payment for the shares as satisfies sect. 25 of the *Companies Act*, 1867.

Sir R. Malins, V.C.:—

This case is by no means free from difficulty. The company was a small one, formed to carry on Mr. *Coates'* business, and by the terms of the agreement for purchase the purchasers were to pay one half of the purchase-money in shares. That arrangement was entered into before the signature of the memorandum of association. Of that there can be no question, because the articles of association, which were signed and registered at the same time, recite the fact that such an agreement had been prepared. Mr. *Coates* signed the memorandum of association for 2500 shares. Other persons signed it for other shares, and the number so signed for amounted altogether to 6125. The memorandum of association provided that the capital should consist of £7500, divided into the same number of shares of £1 each. It is clear, therefore, that the intention of Mr. *Coates*—the understanding of the parties—was that the shares for which he subscribed were to be fully paid-up shares. But then comes the question, whether the *Companies Act*, 1867, has been complied with, it being

(1) Law Rep. 9 Ch. 60.
(2) Ibid. 5 Ch. 346.
(3) Ibid. 11 Eq. 131.
(4) Law Rep. 14 Eq. 387.
(5) Ibid. 3 Ch. 119.
(6) Ibid. 6 Ch. 48.

a matter of the highest importance that it should be very strictly complied with. Now, the memorandum being perfectly silent as to whether the shares are fully paid up or not, Mr. *Coates* must be taken to be liable to pay them up in full unless he brings himself within the conditions of the 25th section, which is in these terms: "Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." It is, therefore, perfectly competent for a person to sign a memorandum of association apparently for shares liable to payment, provided that before the shares are issued a document in writing is executed and filed, providing that the shares shall not be paid up in full. Now I quite agree with the argument of the Respondents here as to the intention of complying with the Act of Parliament. On the 6th of October the document which had been executed on the 30th of September is duly registered:— [His Honour then read the clause of the agreement above set out, and continued:—]

It has been argued, on the part of Mr. *Coates*, that under this clause the Act of 1867 is strictly complied with by the registration of this document before the allotment which took place on the 10th of October. I quite agree that that is the object, but I must observe that the document fails in the requisite precision of language in not pointing out, as was done by a subsequent part of the proceedings, that the 2500 shares which were to be allotted to him as free shares were the same shares for which he had signed the memorandum of association. It has been conceded that if those words had been added all possibility of doubt would have been removed. But there are various grounds on which it is maintained that the same shares must have been intended. It is said that otherwise there were not 2500 shares left to be allotted, but to this argument it is replied that, although there was power to issue more shares *primâ facie*, it was to be presumed they were to be allotted to other shareholders; and I think that meets the difficulty.

Now, although I am satisfied as to the intention of the parties,

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if that had been the only argument which could have been brought forward in favour of Mr. *Coates*, I should most probably have felt bound to come to the conclusion, as a matter of strict right, that inasmuch as every subscriber to the memorandum of association of a company must pay for every share for which he subscribes, unless he can strictly and literally bring himself within the protection of the 25th section of the *Companies Act*, 1867, that Mr. *Coates* has not done either, and that he must be considered liable to pay for these shares.

But then it is argued that, assuming that he is bound to pay for these shares, in point of fact he has done so. But to this it is replied that all the cases where payment "in meal or malt," as it is called, has been held to be good payment, were decided with reference to companies to which the Act of 1867 did not apply, and that what might have been a good payment formerly may not be such now. I confess I do not so understand the Act. I quite see the stringency of the provisions with regard to the liability on shares subscribed for, but I do not understand that the Act of 1867 has made any alteration whatever with regard to what shall be good payment for shares which have been admittedly subscribed for. If a man subscribes, as in this case Mr. *Coates* did, for 2500 shares, he thereby incurs the liability to pay some sum of money, say £2500, and if in payment of this sum he hands over to the company goods which they wanted for the purpose of their business, the validity of the transaction would not be affected by the Act of 1867; and I think that no case has occurred in which it has been held that it would not be considered as payment; and I take it to be perfectly clear from all the authorities cited that payment may be made otherwise than by cash.

Now Mr. *Glasse* very much urged *Fothergill's Case* (1) and *Dent's Case* (2). In *Dent's Case* the Lord Chancellor considered that there was a liability, but he says (3): "Now, if it had been shewn that this was founded on anything equivalent to actual payment, I should have been willing to give effect to it in accordance with the case which I have referred to, but I can find no trace of anything of the kind. The previous agreements between *Even* and

(1) Law Rep. 8 Ch. 270. (2) Law Rep. 8 Ch. 768.
(3) Law Rep. 8 Ch. 776.

the company are all before the Court, and I find that in the particular agreement referred to, which is dated the 19th of September, 1865, certain persons who are subscribers to the memorandum of association, being creditors of the contractor for work and labour done, or money advanced for preliminary expenses, in respect of which he had a claim upon the company, are to be paid what is due from him to them in paid-up shares of the company; and I do not say that the Court would not give effect to such an arrangement." There are other passages in the judgment all going to this, that although there must be payment it is quite open to the person to shew that there is payment, or that there is that which the Lord Chancellor says is equivalent to payment, not necessarily in money, but in money's worth.

Then there is *Spargo's Case* (1), which was decided by the Court of Appeal. There the two Lords Justices gave their decision the day after the decision in *Fothergill's Case* (2), in which they had taken part. *Spargo* signed the memorandum of association for thirty-one shares, and he was in consequence liable to pay £1550. It does not require the Act of 1867 to shew that such a person is liable for the amount for which he subscribes, and the Vice-Warden of the Stannaries Court put him on the list of contributories, considering that he had incurred a liability by signing the memorandum of association, which could only be discharged by payment in cash. But *Spargo* had also agreed to sell to the company the lease of a mine for £2776, and in a settled account they gave him credit for the £2776 as against the price of his shares. That was treated by the Court of Appeal as a good payment. The lease of the mine was the thing with which the company was trading, and so they gave him credit for that, and so here Mr. *Coates* was to have £5000 for the business, of which £2500 was to be paid in cash and the other half in fully paid-up shares, and he treats himself as being fully paid up, and if he is not fully paid up under this transaction he remains a creditor for the £2500.

But Mr. *Glasse* says that the account settled is of a very different character from that in *Spargo's Case*, which begins: "To share capital, thirty-one shares, signed for in memorandum, £1550; ditto, twenty, taken at meeting, £1000." Now I think I

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 8 Ch. 270.

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should be putting a very illiberal and unjustifiable construction on the account settled by *Coates* if I were not to say that it is precisely the same in the result. The account begins: "2500 fully paid-up shares." He is then charged with the £2500, and then there are the instalments, and so forth. Then he is credited with the £5000 for the sale of the business, and he is debited with the 2500 fully paid-up shares, equal to £2500. Then there is the other payment in cash, and after debiting him with the £2500 and all the amounts he received, he remains a creditor for the balance. I consider that it would be a very short-sighted and illiberal and unjustifiable view of that account to say that the 2500 shares there mentioned did not mean those for which he subscribed, and which most undoubtedly all the surrounding transactions shew they were intended to be, although it was not so expressed in the memorandum.

I am well aware that questions of liability in reference to joint stock companies have become most puzzling, and I do not think that this branch of the law is in a very creditable state. In many cases common sense and propriety are utterly set aside on merely technical considerations. It is suggested here that there is a body of creditors to be protected; but these are transactions by which no creditor can possibly be deceived. Because, although a creditor may originally look at the memorandum of association, what he really ought to rely on is the register of shareholders, kept in the office of the company. And Mr. *Coates* is entered in the register as holding only fully paid-up shares. They are not in terms stated to be paid up in full, but the form of the register is such as to shew that there is no liability to any further call.

Now, though *Spargo's Case* (1) is the latest, there is also the case of *In re Baglan Hall Colliery Company* (2), in which I took a rather more strict view, and thought there was nothing which amounted to payment. But the Lord Justice *Giffard* differed from me on that subject, and I must take the law from him. That case decided that where a person signed a memorandum of association for a certain number of shares, and instead of paying in money gave property which was to be the means of obtaining money, the giving money's worth was as good as giving money,

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 5 Ch. 346.

and the parties were thereby discharged from liability. In *Schroder's Case* (1) I held that shares taken in a company were well paid for by giving Confederate bonds, taking them at the market price of the day and entering them in the account; and in the same way by the delivery of tea, which was also required for the purposes of the company. Those cases were before the Act of 1867, but I hold that the Act made no alteration as to what was good payment for shares admittedly taken, and upon which there is a liability; and so I find the Lords Justices *James* and *Mellish* held in *Spargo's Case*. The Lord Justice *James* there says (2): "The question turns upon what is the true intent and meaning of the 25th section of the *Companies Act*, 1867, which we had to consider very fully in *Fothergill's Case* (3), in which judgment was delivered yesterday by the Lord Chancellor and ourselves. In that case no doubt it was not necessary for us to lay down what would amount to 'payment in cash,' since we were clearly of opinion that there had not been any payment of cash, or anything that could be called a payment of cash, in that particular case; but it was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be a payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision. The object of the section was, I apprehend, to prevent such contracts as had been before the Court in *Pellatt's Case* (4) and *Elkington's Case* (5), in which a man was to take shares and to pay for them by supplying goods when wanted." Applying that, it is perfectly clear that in this case the company had entered into a contract which would have justified their paying Mr. *Coates* £2500 in cash. If they had fulfilled that contract they would have handed him bank notes or a cheque, which he would have handed

(1) Law Rep. 11 Eq. 131.
(2) Ibid. 8 Ch. 411.
(3) Law Rep. 8 Ch. 270.
(4) Ibid. 2 Ch. 527.
(5) Law Rep. 2 Ch. 511.

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back again in discharge of the 2500 shares for which he signed the memorandum of association. Nothing can be more reasonable than such a view of the case. Then Lord Justice *Mellish* says (1): "I am of the same opinion. I gave my opinion in *Fothergill's Case* yesterday on the proper construction of the 25th section of the Act of 1867. I then stated, that in my opinion, if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but if they would support a plea of payment, then the 25th section did not prevent their being a good defence. In the present case I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defence under a plea of payment. Nothing is clearer than that, if parties account with each other, and sums are stated to be due on one side and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed it is a general rule of law that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

I am, therefore, of opinion that the transaction by which credit was given to Mr. *Coates* for the value of his business is precisely the same as giving *Spargo* credit for the value of his lease. It was settled in account, and they would have been justified in handing the money to him, and then he would have handed it back to them in payment of the calls on the shares for which he had subscribed the memorandum of association. I think, therefore, that Mr. *Coates* is not liable to pay anything upon these shares; and when I find that by the resolution of the 10th of October, 1870, the company state that the 2500 shares are the same for which he signed the memorandum of association, and that there has been before the creditors for more than two years a register of shares shewing that Mr. *Coates* is not liable, I am satisfied that

(1) Law Rep. 8 Ch. 414.

there are no equitable considerations which give the creditor a right to raise this question. The application must be refused, and both parties will have their costs out of the estate.

V.-C. M. 1873 COATES' CASE.

Solicitors: Messrs. *Wood & Hare;* Messrs. *Bevan & Whitting.*

In re EXMOUTH DOCKS COMPANY.

V.-C. M. 1873 *Nov.* 20, 24; *Dec.* 12.

Companies Act, 1862—*Winding-up of Unregistered Company—Railway Company—Incorporation by Act of Parliament.*

The exception from the power to wind up unregistered companies given by sect. 199 of the *Companies Act*, 1862, of railway companies incorporated by Act of Parliament, applies only to companies whose principal object is the construction of a railway, and therefore a company whose principal object is the construction of docks is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks.

Where, in an Act of Parliament incorporating a company, it is stated that the construction of the works authorized by the Act is of public advantage, the Court will be reluctant to make an order to wind up the company, unless it is shewn that there is no other process by which its difficulties can be overcome.

Debenture holders of a company being empowered by Act of Parliament to enforce the payment of principal and interest by the appointment of a receiver:—

Held, that, until a receiver had been actually appointed and had failed to obtain payment, the Court would not, at the instance of debenture holders, order the company to be wound up.

THIS was a Petition to wind up the *Exmouth Docks Company.*

The company was incorporated by an Act of the 27 & 28 Vict. c. cccxix., intituled, An Act to authorize the construction of docks and a branch railway and other works at *Exmouth*, in the county of *Devon.*

The preamble recited, amongst other things, that the making of docks and a branch railway at *Exmouth*, in the county of *Devon*, would be attended with local and public advantage, and that the branch railway would join the *Exeter and Exmouth Railway*, which was worked by the *London and South-Western Railway Company*, and it was expedient that the *London and South-Western Railway*

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Company should be empowered to enter into such arrangements as were thereinafter mentioned with respect to the branch railway.

Section 1 of the Act provided that its short title should be "The *Exmouth Docks Act*, 1864," and by sect. 4 the name of the company was enacted to be "The *Exmouth Docks Company*." By sect. 2 "the works" were defined to be "the docks, railway, and works of the company to be constructed under the powers of the Act in connection with the said docks;" and amongst other Acts incorporated with the Act were the *Railways Clauses Consolidation Act*, 1845, and Parts I. and III. of the *Railways Clauses Act*, 1863.

After providing for the capital of the company, the Act, by sect. 8, gave power to borrow, for the purposes of the works thereby authorized, under certain conditions, any sum not exceeding in the whole £15,000.

Sect. 9 was as follows:—"The mortgagees of the company may enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages by the appointment of a receiver; and in order to authorize the appointment of such receiver, in the event of the interest or principal moneys then due on such mortgages not being duly paid, the amount owing to the mortgagee by whom application for such receiver shall be made shall not be less than one thousand five hundred pounds in the whole."

The Act contained provisions for taking tolls on the railway, and in a schedule the heads of an agreement with the *London and South-Western Railway Company* for working the branch.

By a subsequent Act of 33 & 34 Vict. c. cxlii., called "The *Exmouth Docks Act*, 1870," the *Companies Clauses Act*, 1869, was incorporated, and the time for construction of the works was enlarged.

By an agreement dated the 14th of January, 1865, made between the company and *William Jackson*, a contractor, it was provided that all the shares were to be issued to the contractor as fully paid-up shares, in consideration of his carrying out the works.

The principal object for which the company was established was the construction, maintenance, and working of docks at *Exmouth*, and the branch railway to be made was in fact merely a line

about half a mile long, running from the station at *Exmouth* to the docks, and intended to be used exclusively for the purpose of conveying passengers and goods to and from the docks.

Mr. *Jackson* took up the shares according to the agreement, and commenced the construction of the works.

On the 30th of January, 1867, five debentures of the company for £1,000 each for five years were, at the request of *Jackson*, the contractor, issued under the seal of the company to the Petitioner, *Richard Turnor*, and on the 25th of April, 1868, two further debentures for £5000 each were also issued to him.

The company had turned out financially an entire failure, and the interest on the debentures had never been regularly paid, and a considerable portion of it remained owing. The principal was also now due, and had remained unpaid, though a written demand for payment had been duly served on the company, who had in fact no funds whatever.

Mr. *Turnor* therefore petitioned as a creditor to have the company wound up as an unregistered company under the 199th section of the *Companies Act*, 1862.

The Petition came on for hearing on the 20th of November, and the first question raised was whether the company was capable of being made the subject of a winding-up order, or was within the exception to the 199th section of railway companies incorporated by Act of Parliament.

Mr. *Glasse*, Q.C., and Mr. *Chitty*, for the Petitioner:—

The construction and maintenance of the docks are the principal objects of this company, the branch railway being entirely subsidiary, and intended only for purposes connected with the docks. The fact of a company being incorporated by Act of Parliament does not prevent its being ordered to be wound up under the *Companies Act*, if it does not come within the special exception: *In re Wey and Arun Junction Canal Company* (1); *In re Bradford Navigation Company* (2). The *Dagenham Docks Company* was also ordered to be wound up. That this is a docks company, not a railway company, is shewn by the name of the Act and of the company. The exception in sect. 199 of the *Companies Act* can

(1) Law Rep. 4 Eq. 197. (2) Law Rep. 5 Ch. 600; Ibid. 10 Eq. 331.

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only apply to a company whose chief object is the construction of a railway.

Mr. *Higgins*, Q.C., and Mr. *W. W. Karslake*, for the company:—

This is a railway company incorporated by Act of Parliament. It is a company one of whose objects is the construction of a railway, and such a company must be considered as being within the purview of the exception. It is within the definition of the *Railway Clauses Acts*, 1845 and 1863, and the *Railway Abandonment Act*, 1850, and a warrant of abandonment from the Board of Trade is a necessary preliminary to a winding-up order. The definition in the *Regulation of Railways Act*, 31 & 32 Vict. c. 119, s. 3, also bears out this view. The creditor is entitled to take nothing but the fruits of the company as a going concern, and this is done by the appointment of a receiver, and the Petitioner knew from sect. 9 of the special Act that this was his remedy for non-payment of the debentures.

Mr. *Jackson*, Q.C., for some of the present holders of shares originally granted to *Jackson*, the contractor:—

The fact of the incorporation of the Railway Clauses Acts concludes the question. It only applies to railway companies. A railway company incorporated by Act of Parliament may be defined to be one with which the Railways Clauses Acts are incorporated.

Mr. *Langworthy*, for other holders of shares who were in a similar position, also opposed the Petition.

Mr. *Glasse*, in reply:—

There is no definition of a railway company in the Railways Clauses Acts nor in the *Railway Abandonment Act*, and the expression, "any railway of a railway company," used in that Act, shews an intention to make a distinction between railways made by railway companies and those made by other companies. Any sections in the Railways Clauses Acts which may be relied on by the company are similar to others in the *Dock Companies Act*.

SIR R. MALINS, V.C., said that the view he then took was,

that the company was within the exception, but he would consider the case further, and mention it again if he altered his opinion.

Nov. 24. SIR R. MALINS, V.C.:—

This is a Petition to wind up an unregistered company under sect. 199 of the *Companies Act*, 1862. The objection was taken that it was a railway company within the exception in that section, and that there was no power to wind it up. I heard the arguments, and intimated what opinion I then held, but stated that I had not then finally decided the case, but that the order would be in accordance with the view I then expressed, unless I saw reason to change my opinion. I gave my reasons at the time for thinking that this was a railway company which could not be wound up.

I have, however, since then reconsidered the question, and I now think that Mr. *Glasse's* arguments are well founded, and that this company must be considered a dock company, and not a railway company.

I must, consequently, overrule the preliminary objection, and the Petition must be heard on its merits. The result will be that it will take its place in the paper on the first petition day in the sittings after term as part heard.

Dec. 12. The Petition now came on again.

Mr. *Glasse*, Q.C., and Mr. *Chitty*, for the Petitioner:—

In the case of a creditor a winding-up order is *ex debito justitiæ*, except where there is a disputed debt: *In re London and Suburban Bank* (1); *In re Imperial Silver Quarries Company* (2); *In re King's Cross Industrial Dwellings Company* (3).

It has been suggested that there was some informality in the issue of the debentures, and that the secretary affixed the seal of

(1) Law Rep. 6 Ch. 641. (2) 16 W. R. 1220.
(3) Law Rep. 11 Eq. 149.

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the company to them without the authority of a general meeting. But there is no doubt that it was done with the full sanction of the directors, and it is not open to them to take the objection after having treated them as valid, and for some time paid interest upon them.

Mr. *Higgins*, Q.C., and Mr. *W. W. Karslake*:—

There is no minute or anything to shew that the authority of any general meeting or special resolution was obtained for the issue of these debentures, and since it is not proved that there was any valid issue of debentures, the Petitioner's position as a creditor cannot be recognised: *D'Arcy* v. *Tamar Kit Hill and Callington Railway Company* (1); *Chambers* v. *Manchester and Milford Railway Company* (2). There is, moreover, nothing to shew that the company have had the benefit of the debentures, as in *In re Cork and Youghal Railway Company* (3).

But supposing the issue of the debentures to be valid against the company, the proper remedy of an unpaid debenture holder is to file a bill and obtain a receiver. This course is pointed out by the 9th section of the *Exmouth Docks Act*, 1864, and the principles laid down in *Gardner* v. *London, Chatham, and Dover Railway Company* (4) as to the remedies of a creditor in the case of a going concern apply to this company. The course adopted in *In re Wey and Arun Junction Canal Company* (5) and the *Bradford Navigation Company* (6), where, though winding-up orders were made, it was found impracticable to work them out without special Acts of Parliament, shews that the provisions for winding up do not readily adapt themselves to companies incorporated by Act of Parliament and the Court, will be slow to make orders which must be practically useless.

Mr. *Jackson*, Q.C., for shareholders:—

The Petitioner must have failed at common law on account of the informality in the issue of the debentures: *Chambers* v. *Manchester and Milford Railway Company*; and he cannot be

(1) Law Rep. 2 Ex. 158.
(2) 5 B. & S. 588. 10 Jur. N.S. 708.
(3) Law Rep. 4 Ch. 748.
(4) Law Rep. 2 Ch. 201.
(5) Ibid. 4 Eq. 197.
(6) Ibid. 5 Ch. 600; Ibid. 10 Eq. 331.

(1) S.C. 12 Jur. N.S. 548

in a better position in this Court, as it is clear that the loan was to *Jackson*, not to the Petitioner, and the debentures must be held subject to any equities between the company and *Jackson*.

Mr. *Langworthy*, for other shareholders.

Mr. *Glasse*, in reply:—

In *Chambers* v. *Manchester and Milford Railway Company* (1) the question was as to the validity of *Lloyd's* bonds, not debentures.

All the Petitioner has to do is to establish against the company *primâ facie* the fact of his having a good debt, and it is sufficient to say that it is clear that the company have had the benefit of the expenditure of his money.

The principles laid down in *Gardner* v. *London, Chatham, and Dover Railway Company* (2) can have no application. It was, *ex concessis*, a railway company which could not be wound up.

The only result of obtaining a receiver will be that it will be found that there is nothing to receive, and the Petitioner will be driven to apply for a special Act.

Sir R. Malins, V.C., after referring to the facts, and expressing his opinion that, under the circumstances, the debentures constituted a valid charge against the company, continued:—

I have here a company constituted by an Act of Parliament passed in the year 1864. That Act of Parliament recites that the making of docks and a branch railway at *Exmouth* would be attended with local and public advantage. It then prescribes what capital is to be raised, the proportion of it which is to be raised by debentures, and the remedy of the mortgagee and debenture holders in case of their not being paid. The remedy given by the Act of Parliament is this:—[His Honour then read the 9th section of the Act, and continued:—]

It appears by the accounts that this concern is a signal failure.

Under such circumstances, I should have expected that inasmuch as *Jackson's* money had unquestionably constructed the works, and his interest is now vested in the Petitioners, the

(1) 5 B. & S. 588. (2) Law Rep. 2 Ch. 201.

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managers of the undertaking would give the person who advanced the money every facility for recovering what he could out of so disastrous a concern. Instead of that, every possible technical objection has been taken, and I desire to express the greatest disapprobation of the course adopted by the company. I should be sorry that this state of things should continue, but the Legislature has said that the construction of these works is of public advantage, and after the lapse of only so short a period as nine years from the formation of the company, I do not feel that I can properly make an order to wind it up unless it is positively shewn to me that there is no prospect of any other remedy being efficacious.

Although the case has been argued with great zeal by Mr. *Glasse*, and with his usual ability, he has entirely failed to prove to me that if an order to wind up the company were made it could be of any practical advantage to his client. I have been referred to the cases of *In re Wey and Arun Junction Canal Company* (1) and *In re Bradford Navigation Company* (2), before me, in each of which, though I made winding-up orders, they could not be carried into effect without the authority of Parliament, and an Act of Parliament was obtained to authorize the sale of the land and works, and to carry out the liquidation. So in this case, if I were to make a winding-up order, it could only be carried into effect by the aid of an Act of Parliament, and, considering the necessary expenses of an application to Parliament, I cannot see that any balance of advantage would accrue to Mr. *Turnor*.

But beyond that, I must take Mr. *Turnor* as having advanced his money with full knowledge of the Act of Parliament under which the company was constituted. He is a debenture holder, and the Act prescribes the remedy of debenture holders to be by the appointment of a receiver. Mr. *Glasse* asks what would be the use of appointing a receiver when there is nothing to receive? It has been suggested on the other side that this may be an improving property, and I proceed partly on the ground that I believe that if it were in different hands it is not improbable that, considering the situation of the docks with reference to *Exeter*,

(1) Law Rep. 4 Eq. 197. (2) Law Rep. 5 Ch. 600; Ibid. 10 Eq. 331.

it might be rendered less unprofitable. I could not, therefore, with propriety, make an order to wind up this concern without having the experiment tried of appointing a receiver, who would in effect be a manager; but I am well aware that in this form of proceeding I cannot do anything of the kind.

[His Honour then commented upon the difficulties which had been placed in the way of the Petitioner by the officers of the company, and continued:—]

Though this is not a railway company, I cannot agree with what Mr. *Glasse* said as to Lord *Cairns'* judgment in *Gardner* v. *London, Chatham, and Dover Railway Company* (1). That company could not be wound up because it was a railway company, but the principle of the case is applicable to this, and the Act of Parliament having given the remedy by the appointment of a receiver only, I repeat that the lender of money must be taken to do so with the knowledge of that fact, and in reliance on that remedy which the Act of Parliament gives him. The reasons stated by Lord *Cairns* are these (2): "Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated." That is my view with regard to this concern. Then he says: "The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed." Those observations appear

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 2 Ch. 217.

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to me to apply to the present case. There are therefore two grounds on which I cannot wind up this company—first, because the Legislature has declared it to be a work of public importance, and subsequent experience has not been, in my opinion, sufficient, considering in whose hands this property has been, to pronounce it worthless; and secondly, because the Act of Parliament has given a distinct remedy, and not the remedy of winding-up, and consequently the Petition must be dismissed. But, considering the defence that has been raised, and the utterly unbecoming conduct of those who are endeavouring to defeat Mr. *Turnor's* claim, I shall give no costs. The company cannot have any for the reasons I have stated, and, considering the utterly wretched and impoverished condition of this concern, I would not have held out any encouragement to solicitors to multiply costs by allowing the shareholders their costs, even if I had allowed any to the company.

Solicitors: Messrs. *E. J. Sydney & Son;* Messrs. *Whitakers & Woolbert;* Mr. *T. H. Summerlin.*

V.-C. M. 1873 *Dec.* 18.

CLOVER *v.* ROYDEN.

[1873 C. 270.]

Published Registry of Ships—Ship's Class—Injunction.

Upon motion for an injunction by subscribers to an association called *The Underwriters' Registry*, who had had a ship registered by the association in the highest class, to restrain the Defendants, the committee of the association, from inserting, after a subsequent survey allowed by the Plaintiffs, in their published registry of ships the words "Class suspended" against the Plaintiffs' ship:—

Held, that the Defendants were justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the Plaintiffs should have altered the ship according to their requirements.

THE Plaintiffs were merchants and shipowners at *Liverpool.* In the year 1865 the iron steamship *Tyne Queen* was built at *Newcastle-on-Tyne*, and she became the property of the Plaintiffs in

the year 1870, since which time she had been registered in their names alone. This vessel was upwards of 1000 tons burden, and traded from the port of *Liverpool*. The Defendants were the chairman and committee of an association formed by underwriters in the year 1862, at *Liverpool*, similar to the *London "Lloyd's,"* and called *The Underwriters' Registry for Iron Vessels*, by whom a registry was kept for all iron vessels in the world. The Defendants' association published annually a list of iron vessels for the use of their subscribers; but any person might obtain a copy of such list by paying the annual subscription of £2 2*s*.

By the 7th rule of this association it was provided as follows:—"A thorough survey will be required once in every four years for vessels with a red certificate for twenty years, and once in every three years for vessels with a red certificate for less than twenty years; vessels with a black certificate for less than twenty years to be surveyed every two years. When vessels are abroad at the time they become due for survey they must be thoroughly examined on their return to the *United Kingdom*. The surveyors are at all times to have free access to examine vessels holding a certificate from this committee, and in case of defects reported by them not being made good the classification of the ship shall be revised." And appended to the rules of the association was the following notice:—"Vessels due for periodical survey, which leave the *United Kingdom* without being duly surveyed and passed by the surveyors to this registry, will have their class suspended until such survey has been properly made. Notice of such suspension of class will be given in the first monthly supplement issued after the sailing of the vessel. Vessels remaining abroad for two years after they become due for periodical survey will have their class suspended until they have been re-surveyed."

The steamship *Tyne Queen* was submitted to the inspection of the surveyors of the said association during construction, in the year 1865, and was built and completed to their satisfaction; and on completion the vessel was classed by the association in their highest class, namely, "twenty years, red;" meaning thereby that the vessel was of the first class and good for twenty years, this classification being equal in all respects to the class called "A 1" at the *London "Lloyd's."*

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The Plaintiffs, in the year 1870, determined to have their vessel lengthened, and to have an awning or spar deck constructed over the engine room, so as to make it cover in the whole length of the main deck of the ship. The alterations were completed, and the manner in which the work was carried out was approved by the surveyors of the *London "Lloyd's;"* but the surveyors of the *Liverpool* registry objected to it, and in their following publication of the list of iron ships for the year from September, 1872, to August, 1873, the *Tyne Queen* appeared with the following words printed in the margin under the figures "20," red:—"Class suspended 1871." The Plaintiffs having asked for an explanation of this entry, received this letter, dated the 2nd of September, 1872, from *W. W. Rundell*, the secretary of the association:—

"Gentlemen,—In reply to your inquiry as to the class of the *Tyne Queen*, s.s., I am directed to inform you that, on vertical bracket plates 7/16 thick, and the width of the waterway, being fitted under each beam of the spar deck, and extending from the main to the upper deck, and also double angle irons being worked through the midship portion of the deck, so as to connect the horizontal plates to the end portion of the spar deck—the work being done under the inspection of and to the satisfaction of the surveyors of this registry—the committee will be ready to reinstate the vessel to her former class."

To this letter the Plaintiffs caused the following answer to be sent, dated the 3rd of September, 1872:—

"Sir,—We are in receipt of your favour of yesterday, and as it will not be in our power at present to comply with the request contained therein for the continuation of the s.s. *Tyne Queen* in your book of classification, we have to request that you will, in the meantime, withdraw the vessel altogether therefrom."

This request to withdraw the vessel from the register was, as the Plaintiffs stated, in accordance with the constant practice of the Defendants' association, and in their present list no fewer than twelve different vessels were marked in the list as having been withdrawn by the owners; and the Plaintiffs alleged that it was the absolute right of the owners of any ship in the list to have it

withdrawn therefrom. The Defendants still refused to alter their register or to strike out the objectionable words complained of by the Plaintiffs until the alterations required by the association should have been effected. The present bill was therefore filed, in which the Plaintiffs alleged that the retention of the objectionable words in the register was calculated to seriously depreciate the value of the *Tyne Queen*, which was the only vessel against which such a remark had been made in the Defendants' register, and that it was calculated to injure the character of the vessel, and also prejudice the Plaintiffs in effecting insurances on the vessel, and diminish the amount of freight which the Plaintiffs could otherwise earn. The bill prayed that the Defendants might be restrained by injunction from printing, distributing, selling, or otherwise disposing of any copy of their list of iron vessels having the words "Class suspended 1871" placed opposite to, or in any way in connection with, or so as to apply to the Plaintiffs' ship, the *Tyne Queen*, and that all copies of the said list having those words thereon in the Defendants' possession, custody, or power, might be destroyed or the said words erased therefrom; that the Defendants might be ordered forthwith to issue a notice to all subscribers to the book that the words "Class suspended 1871" had been removed from the said vessel, the *Tyne Queen*, and that she had been withdrawn from their list at the owners' request; and that the Defendants might be ordered to pay the costs of the suit.

Evidence was produced on behalf of the Plaintiffs to shew that the *Tyne Queen* was a vessel of the first class; that the alterations effected in her in 1870 tended to improve her in all respects, and not to weaken her; that the vessel was not less seaworthy than she was before; and that the surveyors of the *London* "*Lloyd's*" had inspected the alterations and had approved of them, and the vessel was still continued to be registered at "*Lloyd's*" in class A 1. There was also evidence to shew that the Plaintiffs had suffered serious injury from the conduct of the Defendants in making the addition to the registry which was now complained of.

On the other hand, the evidence on behalf of the Defendants went to shew that their registry of iron ships was published with a view to give information to underwriters, charterers of ships, and the public generally as to the character of all iron ships in the

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world; that this could only be carried out by means of periodical surveys effected by their own surveyors; that these reports were made in good faith, and not for the purpose of doing personal injury to any shipowner; and that the managers of the association formed their opinion upon such reports, and considered themselves bound to advertise such opinions in their publication for the information and benefit of their subscribers; and further, that the course they had pursued in regard to the Plaintiffs' vessel was in strict accordance with the rules of their association, which were well known to the Plaintiffs, and were, as they alleged, acquiesced in by them when they sanctioned the surveys of the *Tyne Queen*.

Mr. *Glasse*, Q.C., Mr. *Robinson*, and Mr. *R. G. Williams*, for the Plaintiffs, now moved for an injunction in the terms of the prayer:—

The Defendants in this case have thought fit to publish in their register of iron ships a statement which is calculated to injure the property of the Plaintiffs, which they are not justified in doing. The *Tyne Queen* is a vessel of considerable size, being above 1000 tons burthen. She was built in 1865, and is, therefore, a new ship, and the Defendants expressed the value and rank of the ship at the time she was built by placing her in the highest class upon their register, namely, "20 years, in red," signifying that she was a ship of the best construction, and was good for twenty years. At the same time the vessel was registered at *Lloyd's* in their highest class, namely, "A 1." The fact of this classification being made at *Lloyd's* is alone a sufficient guarantee of the value and sound qualities of the ship. What, then, has happened to induce the Defendants to turn round upon the Plaintiffs and insert an injurious notice to their subscribers that the vessel is no longer to be placed in the highest class? What the Plaintiffs have done since the *Tyne Queen* came into their possession has been to alter her by adding an awning or spar deck for the express purpose of rendering her still more safe and seaworthy; and that this is the general opinion of shipbuilders and underwriters, is proved again by the fact that she is still classed A 1 at *Lloyd's*, after a full survey made of her by that association, which, it must be admitted, stands at the head of all associations

of the kind. Moreover, we have abundance of evidence to shew that this opinion is held by a great number of scientific men.

But the Defendants take upon themselves to allege that where a vessel is so altered she further requires to be strengthened by the addition of works which would add considerably to the expense. Suppose this should be the honest opinion of the surveyors employed by the Defendants, still they have no right to insert in their register a damaging statement that the class of the ship has been suspended. We have proved also that, in the case of other ships owned by another company, the Defendants have acceded to the request made to them that they would insert a notice that the vessel had been withdrawn from the register at the owners' request. We have, therefore, a right to demand that the same course should be adopted with regard to the *Tyne Queen*. We ask the Court to grant this injunction upon the general principle that the Court will always interfere to prevent anything being done to cause an injury to property. In *Dixon* v. *Holden* (1) it was held that this Court had jurisdiction to restrain the publication of any document tending to the destruction of property; and in the *Springhead Spinning Company* v. *Riley* (2), your Honour laid down the same principle, and granted an injunction to restrain the issuing of placards and advertisements by a trades union, that the union men were not to hire themselves to the Plaintiffs pending a dispute between the union and the Plaintiffs, on the ground that the Plaintiffs were thereby prevented from continuing their business, and the value of their property was consequently injured and seriously diminished. It is true that Lord *Langdale* refused to interfere in favour of Sir *James Clark*, in *Clark* v. *Freeman* (3), to restrain the sale of pills under false representations that they were made from the prescription of the Plaintiff, but this was on the ground that the reputation of Sir *James Clark* was not likely to suffer from so slight a matter. However, that decision was dissented from by Lord *Cairns* in *Maxwell* v. *Hogg* (4), who said, "It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the Plaintiff, on the ground that he had a property in his own name."

(1) Law Rep. 7 Eq. 488.
(2) Ibid. 6 Eq. 551.
(3) 11 Beav. 112.
(4) Law Rep. 2 Ch. 307, 310.

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In this case we prove that an injury has been effected to our property by the Defendants' publication, and that the Plaintiffs are not able to procure the same rate of freight, and have great difficulty in obtaining charterers for their vessel; therefore we ask for an injunction to restrain the course pursued by the Defendants, and to insist upon a right which has been acceded to by the Defendants in other cases, of having the vessel withdrawn from the register.

The Plaintiffs in these proceedings are also actuated by motives of a public nature, as they believe that the conduct of the Defendants is calculated to do serious injury to owners of ships, and that they are influenced by the men appointed surveyors of vessels who, in order to secure their own fees, assert doctrines with regard to the construction of vessels which are not held by the majority of shipbuilders.

Mr. *Cotton*, Q.C., Mr. *Cohen*, and Mr. *F. Thompson*, for the Defendants:—

There is no ground in this case for the interference of the Court. These are the facts: The Defendants publish, for the benefit of their subscribers, a register of all the iron steam and sailing ships in the world. The book contains the classification of the ships, but some ships are not classified because they have not been surveyed by the association. The Defendants have acted in a perfectly *bonâ fide* manner. They entered the *Tyne Queen* when she was first built, after being surveyed under the head "20 years, red," which was their highest class. The Plaintiffs have had the advantage of the publication of that classification for some years, and now, upon these alterations being effected—the Defendants having re-surveyed the ship with the sanction of the Plaintiffs—have expressed their opinions in good faith that the vessel cannot be placed by them in the same class until she is strengthened. The certificate has not been withdrawn, but only suspended. It would seem that the surveyors of the *London Lloyd's* have taken a different view of the construction of ships; but the question of spar decks is one which has been much discussed by all shipbuilders and seafaring men, and their opinion differs greatly. Still the Defendants are entirely justified in expressing their opinion as

to the value of spar decks. They maintain that ships with that addition require to be strengthened, and it appears that an outlay of only £200 would have effected the improvement required by the association. If the Plaintiffs desired the advantage of being classed "20 years, red," in the Defendants' register, they had but to comply with these requirements; but until that was done the Defendants, in justice to their subscribers and the public, who trust to their register, could not do otherwise than express their honest opinion. The Defendants are justified in inserting in their book all the information they please about ships so long as it is true. They insert a fact and nothing more. It is not alleged that there is any mis-statement, nor is it alleged that there is malice in what has been done. The statement does not convey the impression that the ship is unseaworthy, but only that the Defendants are not prepared at present to place her in the same class she formerly was in. It is alleged that the Plaintiffs have sustained injury, but the Court cannot grant an injunction unless there has been a violation, or threatened violation, of legal right. In the case of the *Springhead Spinning Company* v. *Riley* (1), the question was whether the Court had jurisdiction or not. The act complained of was of a criminal character, and the injunction could not have been granted except upon that allegation. The act was illegal, and the decision was, that if injury was done by that illegal act, the Court would interfere. In *Dixon* v. *Holden* (2) there was a clear case of libel, and where there is a libel for which an action will lie, then this Court will interfere. These cases, therefore, support the argument that unless the act is illegal the Court will not grant an injunction. This Court has never granted an injunction where there has been no breach of contract or legal wrong committed. In this case there has been no breach of contract and no legal wrong done for which an action would lie. There could be no action of tort, for there is no false statement in the Defendants' publication, and there is no proof of malice. There could be no action for slander of title, for in that case the Plaintiffs would have to prove the statement to be false and malicious. The law upon this subject is well laid down by Mr. Justice *Maule*

(1) Law Rep. 6 Eq. 551. (2) Law Rep. 7 Eq. 488.

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in *Pater* v. *Baker* (1), where he says: "This is an action for 'slander of title,' which is a sort of metaphorical expression. Slander of title may be of such a nature as to fall within the scope of ordinary slander. Slander of title ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, and therefore falsehood is given in evidence under 'not guilty' since the new rules. It is essential also that it should be malicious, not in the worst sense, but with intent to injure the Plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie, however malicious the Defendant's intention might be."

This is also laid down in *Starkie* on Evidence (2). A right of action must be founded on contract, or tort, or slander of title. Here there is no contract, and no tort, and the only action applicable to the case is slander of title, but then the Plaintiffs must prove malice and falsehood. The first is not alleged, and the second is not proved.

We submit, therefore, that, according to the principles of this Court, no injunction can be granted.

Mr. *Glasse*, in reply:—

It is contended that there is no malice alleged, but this is not the fact. The case made out is one of an intention to injure the Plaintiffs, and that of necessity is a malicious intention. It is said also that there must be some legal right infringed or threatened. Is it not so here? Is not the Plaintiffs' right to use their ship to the best advantage damaged by the conduct of the Defendants? This is a damage for which an action would lie. The Defendants, without stating a falsehood, are putting forth partial information, which has the effect of doing an injury to the Plaintiffs. The fact of having formerly placed the ship in the highest class, and then suspended the class, is a notification to the public that she is not now so good a ship or as seaworthy as she was before. This is a positive injury, and it would be seriously injurious to all shipowners if such a proceeding could not be prevented.

(1) 3 C. B. 868. (2) Pages 41, 42, 168.

SIR R. MALINS, V.C.:—

The Plaintiffs in this case are merchants and shipowners at *Liverpool*, and are largely engaged in their business. The Defendants are an association at *Liverpool* called *The Underwriters' Registry for Iron Vessels*. The object of the association is to have a register of every iron vessel, either sailing or steam, in the whole world, and in this registry the vessels are classified in a manner which is perfectly well understood by persons engaged in mercantile affairs, and particularly shipowners. The ship called the *Tyne Queen*, which was built at *Newcastle-on-Tyne* in the year 1865, became the property of the Plaintiffs in 1870. In the registry kept by the Defendants the *Tyne Queen* had, as I understand, the highest mark which she could have, namely, "20 years" in red figures, indicating that she was a first-class ship, and good for twenty years. That was the state of things from the time of her being built in 1865 down to 1871. About a year after the Plaintiffs became her owners, it was necessary that the ship should undergo some repairs and alterations. The Plaintiffs, being members or subscribers to this association, having, as I collect, derived some advantage from the registry of their ship in the register kept by the Defendants, they must have been aware of the rules of the society. When the Plaintiffs proceeded to alter their vessel in 1871, they submitted the result of these alterations to the consideration of the surveyors of the Defendants' association. In a joint affidavit of Mr. *Rundell*, the secretary, and Mr. *Wimshurst*, the surveyor of the Defendants' association, Mr. *Wimshurst* says: "In the course of my duties as surveyor of vessels for the said registry, I observed the said ship *Tyne Queen* undergoing alterations in the building-yard of the firm of Messrs. *George R. Clover & Co.*, mentioned in the Plaintiffs' said bill, of which firm the Plaintiff *G. R. Clover* was then the principal, and I was informed by them of the shape in which it was proposed that such alterations should be made. Thereupon I objected to the mode in which the said alterations were proposed to be carried out, and informed the said Plaintiff that the proposed alterations should be submitted for approval by the committee of the said registry, and at the same time I gave him in general terms the nature of the strengthening that I considered requisite." I understand, according to Mr. *Wimshurst*, that the only thing which was

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required was that certain additions should be made which should strengthen the alterations then effected; which was, in fact, turning this vessel into what is called a spar-decked vessel. The affidavit then states: "Upon the said alterations being completed, I made out the report and specification, and handed the said report to the said committee." Then Mr. *Rundell*, the secretary, states: "And I the said *W. W. Rundell* further say as follows: On the 5th day of December, 1871, a meeting of the committee of the said registry was held at which the said report was considered, and the following resolution passed:—Read Mr. *Wimshurst's* report and specification, December 2nd, relating to erections on the deck of the *Tyne Queen*, by which she had been practically made a spar-decked vessel. The owners to be informed that the recent alterations in this vessel affect her class in this registry, and that the class will be suspended until the erections have been made to the satisfaction of the committee. The report referred to in the said resolution as bearing date the 4th December, 1871, is the said report of the 2nd December, 1871, hereinbefore referred to." Therefore in December, 1871, with, as I stated, the acquiescence of the Plaintiffs, this vessel is surveyed by Mr. *Wimshurst*, the surveyor of the association, with which the Plaintiffs have connected themselves, and from which they have derived the advantage of having their ship classed as a first-class ship, which in *Lloyd's* is called A 1, and in this registry "20 years, red," which, I take it, means practically the same thing. They have acquiesced in this survey being made, and they have been informed of the fact that until certain strengthening works are done the class will be suspended. Thereupon the registry is altered in this way: *Tyne Queen* stands exactly as it did before; her tonnage 1014 tons, the name of the master, the names of the owners, that is, the Plaintiffs; the port of registry *Liverpool*, when built (1865), meaning the first month of that year, namely, January 1865. Then these are the words which it was the object of this motion to have erased or discontinued in the registry: "Class suspended 1871." The Plaintiffs have adduced a large body of evidence by underwriters and shipbuilders of great experience to prove two things—first, that the *Tyne Queen* is a first-class vessel; that she is registered at *Lloyd's* as A 1, which means a very first-class vessel; and that what has been done is not calculated to

weaken the vessel, or render her less worthy as a seagoing vessel than she was before; and they have also proved that that entry in the registry is calculated to injure the Plaintiffs. The evidence of many persons, and amongst others the last charterers of the vessel, proves that it has injured the vessel to such an extent that upon her coming home, making the last voyage from *Canada* to *Liverpool*, there was very great difficulty in obtaining a freight. That it is calculated, therefore, to injure the Plaintiffs, and does injure them, I can entertain no doubt upon the result of the evidence. Still there remains the question whether the Plaintiffs have any right to complain in this Court and ask the Court to grant an injunction to restrain the continuance of that entry. Now what is the meaning of the entry? This is an association which everybody who joins it, I think, must understand is an association based upon this principle, that those who conduct its affairs are to form their own opinion and to class the vessels as they think fit. They exercise their discretion by putting the vessel into the very first class. Could the owners have complained if they had exercised their discretion by putting her in a lower class? That the surveyors exercised honestly their discretion I entertain no doubt whatever. Mr. *Glasse* admits they have exercised their discretion honestly, but he has suggested that the object was to give Mr. *Wimshurst* and those in the same position an additional fee. It is merely a question whether he should have the surveyor's fee or somebody else. Mr. *Wimshurst* swears, and I believe he correctly swears, that "the said committee, in refusing to make the alterations in the register as required by the Plaintiffs, were not influenced by any personal motives towards the said Plaintiffs, but were actuated solely by a desire to perform their duty towards underwriters and subscribers to the registry, who rely upon the statements contained in the said register, and solely with a view to the interests of subscribers and underwriters, and also of the shipping community in general, who, in questions as to the character and seaworthiness of vessels, place very great reliance upon the information contained in the said list." I ask again what is the meaning of that entry—"Class suspended 1871"? Does it mean anything more than that those who conduct the affairs of this association have not, as things now exist, made up their minds in which class she shall now be

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placed, whether she was to remain twenty years, or something lower than twenty years. If that is their opinion, I am at a loss to see upon what ground they are not at liberty to record their opinion. I cannot help thinking that the Plaintiffs have bound themselves to give them the liberty of forming an opinion, and that their own acts in 1871, and again in 1872, are conclusive that they did admit the right of this association to form their opinion as to the classification of this ship, because they again in 1872, not upon their own application undoubtedly, but upon the application of the Defendants, gave an order to survey the ship, and having given that order she was surveyed; which is again, according to Mr. *Rundell*, submitting to the propriety of the Defendants forming their own opinion. That is distinctly shewn by this letter, which is set out in the same affidavit which the Plaintiff wrote on the 22nd of July, 1872:—"We have your favour of the 20th instant, with copy of your previous letter of the 9th December last, respecting the *Tyne Queen*, s.s. Please furnish us with the particulars of the requirements of your committee, referred to in your letter, when the same shall have our best consideration." That is from the Plaintiffs. In answer to that the Defendants' secretary, Mr. *Rundell*, writes on the same day: "I am directed by the committee, in reply to your letter of this date, to say that, on receipt of the necessary order, the chief surveyor will be instructed to visit the *Tyne Queen*, s.s., and report as to the 'awning deck,' and what is necessary to the restoration of this vessel's class." The same affidavit states: "The additions required in the said report could have been easily made at small expense without the necessity of the vessel having to be put into graving dock, and are merely such as would have been required to give the vessel strength barely equivalent to what would have been required by the committee at the time the vessel was built if she had been originally constructed as an awning or spar-decked vessel." Considering that the class of this vessel was suspended in December, 1871, that she has been employed, as I understand, ever since, and that they never found out this grievous evil which they have suffered until very lately—if I were to go upon the question of time, the time which has been allowed to elapse would be a fatal bar to my granting them an injunction upon an interlocutory application. But something more

than I have heard of must have occurred, because imputations have been made on the conduct of the Defendants. If they are to exist for this purpose, as they did exist with the concurrence of the Plaintiffs, for their protection, as well as for the protection of the mercantile class, and indeed society at large, I cannot conceive anything more straightforward or honest than the course they have adopted. If their agents—those persons upon whose opinions they must act—have fairly and honestly come to the conclusion that unless the works of this vessel, after the alterations which have been made, are strengthened in the manner they prescribe, they cannot class her as "20 years, red," surely they must be justified in entering in their own books, as their own opinion, that the class is suspended; that is, that until these works are done they cannot make up their minds, and they suspend their opinion as to what class she shall belong. The whole book is but a matter of opinion. The Plaintiffs have become members of the association, and supported it because they knew that opinions were recorded in that book as to what class a vessel belongs to. If they took advantage, as they did take advantage, of this registry by having the *Tyne Queen* recorded as being a ship of a very first-class, I think they have no right to complain that the same body, exercising an honest discretion—for of course my observation would not apply if there had been any malice or improper conduct, or any improper motive had actuated them so as to injure the Plaintiffs—acting upon the reports of those who must be their advisers, namely, the surveyors, have come to the conclusion that this vessel cannot any longer be ranked as belonging to the first class until the alterations or improvements required in the report are made. I think they were perfectly justified in entering in that registry "Class suspended." If the Plaintiffs join a registry of this kind, are they not bound by it? The committee are not bound to say that the ship is "20 years, red," unless they think so. They are entitled to express their opinion, and they have expressed it. There is no malice; there is no impropriety; there is no want of truth; there is no want of fair dealing. If the Plaintiffs have sustained any injury by it, I think it has been caused in consequence of their own mistaken views. Nothing unreasonable was required from them. As I collect from the evidence, this vessel is stated to be

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worth £25,000; and an expenditure of £200, or thereabouts, would have satisfied the requirements of this association, and if the addition had been made these words would never have been inserted, and she would have remained as belonging to class "20 years, red," and all these evils of which the Plaintiffs complain would have been avoided. Therefore, although I am satisfied they have sustained damage—and the evidence, I think, is distinct on that subject—I am clearly of opinion that it is an evil that they have brought upon themselves. I think a little more forbearing conduct might have remedied it. I am at a loss, on any grounds whatever, to conceive that a case has been established by this bill for the interference of the Court. If it is a case of injury, I think it is not a case for injunction. They may have a remedy elsewhere. Therefore, not only upon the merits, but upon the ground of the long delay and their long acquiescence, I come to the conclusion that a case for an injunction is not established, and the motion must be refused.

My first impression upon the opening of this case was, that it was rather an arbitrary exercise of the Defendants' discretion. But having heard the elaborate and able arguments which have been addressed to me, I see no reason whatever to blame the Defendants for the course they have taken. Nor do I see the slightest ground for coming to the conclusion that in this transaction they have been actuated by any other desire than faithfully to perform that duty which they have undertaken towards shipowners and the public in general. Under these circumstances, I cannot do otherwise than refuse the motion with costs. It has entirely failed, in my opinion, and therefore the usual consequences must follow.

Solicitors for the Plaintiffs: Messrs. *G. L. P. Eyre & Co.*
Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*

LATHAM *v.* CHARTERED BANK OF INDIA.

V.-C. B.
1874
Jan. 14.

[1871 L. 142.]

Mercantile Law—Letter of Hypothecation of Bill of Lading—Insurance Policy Moneys—Bill of Exchange—Agreement by Holders not to present the Bill at Maturity—Effect on the Liability of the Drawer.

A shipper at *Bombay* having consigned goods to merchants in *England*, drew on them for £1200, and insured the goods for £1700. He sold the draft to the Defendants, a bank, and handed them at the same time the policy of insurance and the bills of lading, with a letter of hypothecation signed by him. This letter stated that the shipper, having sold the bills to the bank, and having at the same time handed to them, "as collateral securities for the due payment of" the bill, "the bills of lading and shipping documents of the several goods stated at foot," thereby authorized the bank, "on default being made in acceptance on presentment, or in payment at maturity" of the bill, to sell the goods and apply the proceeds in payment of the bill; "the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank." The only documents stated at foot were the bill of exchange and the bill of lading. The ship was burnt at sea and the cargo lost. The draft for £1200 was duly accepted, but the acceptors failing, it was dishonoured at maturity. The bank recouped themselves out of the policy moneys which had been paid to them by the insurance office, and had a balance in their hands. This balance having been claimed by the Plaintiffs, who were assignees for value of it from the shipper, the bank claimed it as a collateral security for a debt due to them from the shipper on another account. He had shipped goods to other consignees, and had drawn against the goods bills, which were also in the hands of the same bank. When the bills fell due, the drawees had requested the bank to defer presentment of the bills. The bills had not been presented, but the goods had been sold at a loss, and the bank had re-drawn upon the shipper for the deficiency; but he had failed:—

Held, that the letter of hypothecation did not extend to any other liability of the shipper to the bank than that arising upon the £1200 bill:

Held, further, that the bank, having, at the request of the drawees, refrained from presenting the bills, had practically given them time, and had thus released the drawer, and that the shipper was not indebted to the bank on this account:

Held, on both grounds, that the Plaintiffs were entitled to the surplus in the hands of the bank.

MOTION for decree.

In April, 1870, *Jaitha Vullubjee*, of *Bombay*, shipped 100 bales of cotton by the *Aurora* to *Coupland Brothers* of *Liverpool*, and

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drew a bill for £1200, dated the 14th of April, 1870, against the consignment, for their acceptance. The shipper duly insured the cotton for £1700, and immediately upon the shipment sold the draft to the *Chartered Bank of India, China, and Australia*, at the same time handing to them the bill of lading with a letter of hypothecation and the policy of insurance; all which documents the bank forwarded to their *London* agents, who got *Couplands'* acceptance to the bill.

The letter of hypothecation, so far as material, was as follows:—

"To the *Chartered Bank of India, Australia, and China.*

"*Bombay*, April 14th, 1870.

"Having this day sold to you three bills of exchange drawn by me on Messrs. *Coupland Brothers* of *Liverpool*, the particulars of which are noted at foot, and having at the same time handed to you, as collateral securities for the due payment of the said bills, the bills of lading and shipping documents of the several goods also stated at foot, the agreement is understood to be as follows:—

"I authorize the *Chartered Bank of India, Australia, and China*, or any manager or agent thereof (but not so as to make it imperative), to insure the above goods, ... and to add the premiums and expenses of such assurances to the amount chargeable to me in respect of the said bills, and to take their recourse against the said goods or against me for their reimbursement; and also to sell any portion of the said goods which may be necessary for payment of freight; and the said bank are to take such measures generally, and to make such charges for commission, and to be accountable in such manner, but not farther or otherwise, as in ordinary cases between a merchant and his correspondent. . . .

"I further authorize the *Chartered Bank of India, Australia, and China*, or any manager or agent thereof, on default being made in acceptance on presentment or in payment at maturity of any of the above bills, or on the drawees' suspension of payment during the currency of the bills, to sell the said goods or a competent part thereof, and to apply the net proceeds (after deducting usual commission and charges) in payment of such bills with re-

exchange and charges; the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank; and subject thereto to be accounted for to the proper parties. In case the net proceeds of such goods shall be insufficient to pay the amount of any such bills with re-exchange and charges, I authorize the *Chartered Bank of India, Australia, and China*, or the holders thereof for the time being, to draw on me for the deficiency, and I engage to honour such drafts on presentment; it being understood that the account current rendered by the said bank shall be acknowledged and allowed as sufficient proof of sale and loss. . . .

"Lastly, it is mutually agreed that the delivery of said collateral securities to your bank shall not prejudice your rights on said bills in case of dishonour, nor shall any recourse taken thereon affect the title of the bank to said securities to the extent of my liability to your bank as above.

"Your obedient servant,
"*Jaitha Vullubjee.*"

BILLS AND DOCUMENTS ABOVE REFERRED TO.

Particulars of Bills.			Particulars of Goods.	
Date.	Amount.	Drawee.	Bill of Lading.	Name of Ship.
1870. April 14th.	1200	Messrs. *Coupland* Bros. *Liverpool.*	100 bales cotton.	*Aurora.*

Shortly after the commencement of her voyage the *Aurora* and cargo were burnt at sea, and the cotton became a total loss.

On the 28th of October, 1870, before the maturity of the bills, *Coupland Brothers* went into liquidation, and when the bank presented the bill of exchange, it was dishonoured.

At this date *Vullubjee* was under liability to the same bank upon other accounts—particularly upon two consignments of cotton by two vessels called the *Western Belle* and the *Canute*, shipped by him to *Haigh, Wilson, & Co.*, and against which he had drawn two bills for £3000 each upon *Haigh, Wilson, & Co.*, which he had sold to the bank. These two bills became due on the 3rd of December, 1870, and on that date *Haigh* and *Wilson* wrote and

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sent to the bank a letter, of which the material portion was as follows:—

"*Liverpool*, 3rd December, 1870.

"To the *Chartered Bank of India, Australia, and China, London.*

"Gentlemen,—We have to request that you will defer presentment for payment of our acceptances maturing to-day as follows, viz.:"—(Then followed a list of bills, including the two for £3000 each by the *Western Belle* and *Canute*)—"and in consideration of your so doing we hereby hold ourselves in every respect liable to you on account of the said acceptances as if the same had been regularly presented at due date. As further security for all our obligation to your bank, we now hand you £750 as additional margin. It is understood that the cotton represented by the above-named shipments is to be sold under the supervision and control of your agent in *Liverpool*, Mr. *John Scott*, and to whom our broker will have to account for the net proceeds, and that, should all our acceptances not be fully paid before the re-drafts on the respective native drawers for deficiencies are sent out, such re-drafts are to be placed in your hands for collection, and the proceeds to be held by you against any balance that may be due to the bank by us. As further security for all our obligations to the bank, we assign to you all our interest in" (another contract, the particulars of which were not explained).

After receipt of this letter, the bank sold the cotton, but the proceeds fell short of the amount of the bills by nearly £2000. For this deficiency the bank re-drew on *Jaitha Vullubjee*, but could not obtain his acceptance.

On the 18th of January, 1871, *Vullubjee*, being indebted to the firm of *Finlay, Scott, & Co.*, of *Bombay*, assigned the policy moneys in respect of the *Aurora* to them.

In March, 1871, the insurance company paid £1700 in respect of the *Aurora* policy, as for a total loss, to the bank.

In April, 1871, *Jaitha Vullubjee* was adjudicated a bankrupt in *Bombay*, and his estate and effects had become vested in *Henry Gamble*, as official assignee.

Finlay & Co. having claimed the £1700 from the bank, and the bank claiming to be entitled to retain it, this bill was filed on

the 6th of October, 1871, by the members of the firm of *Finlay, Scott, & Co.*, against the *Chartered Bank of India*, and *Henry Gamble*, praying for a declaration that the bank were trustees for the Plaintiffs of the balance of the £1700, after satisfying and retaining the amount due to the bank in respect of the dishonoured bill, and that the bank might be decreed to pay the same to the Plaintiffs.

The Defendants, the bank, by their answer admitted that the policy moneys exceeded the amount due in respect of the dishonoured bill against the shipment per *Aurora* by about £470; but said that *Jaitha Vullubjee* was indebted to them in respect of the deficiencies on the shipments per *Western Belle* and *Canute*, and they claimed under the letter of hypothecation of the 14th of April, 1870, to retain the balance of £470 in discharge, so far as it would extend, of such deficiencies.

The bill was amended, and as amended charged that even if it was the fact (which they denied) that *Jaitha Vullubjee* or his estate was indebted to the bank, yet that the bank, by having agreed, without the consent of *Vullubjee*, to give time to *Haigh, Wilson, & Co.*, had released the estate of *Vullubjee* from all claim in respect of the two bills of £3000.

Mr. *Kay*, Q.C., and Mr. *Ferrers*, for the Plaintiffs:—

It is sufficient that the only shipping document of goods scheduled to the letter of hypothecation is the bill of lading to shew that the Defendants have no claim to the balance of these policy moneys. Even if the letter of hypothecation had in terms extended to the policy of insurance, the bank would not be entitled to retain the balance to cover any claim beyond the amount of the bill of exchange—that is to say, to apply the balance to a claim arising out of another transaction.

Besides, the letter of the 3rd of December, 1870, was a plain agreement by the holder of a bill to give time to the acceptor. According to the universal rule, such an agreement discharges the drawer from his liability as surety, in case of failure on the part of the acceptor: *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* (1).

(1) Law Rep. 7 Ch. 142.

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The distinction between the right which a shipper who has stopped goods has, against the proceeds of sale of such goods, and against policy moneys which have been paid in respect of a damaged part of the cargo, was clearly pointed out by Lord *Cairns* in *Berndtson* v. *Strang* (1).

The bank do not set up a general credit. They say they have bought two other bills which are not yet paid, upon which they have realized, but have found a deficiency. What proof is there that *Haigh, Wilson, & Co.* will not pay the deficiency?

The right to the policy moneys must follow the right of ownership in the goods. The right of the bank can only arise in the event of the power of selling the goods arising and being exercised.

If the Defendants' argument be good for anything, it must amount to this, that the letter of hypothecation comprised not this transaction alone, but any possible claim, arising out of any state of circumstances, which the bank might have against the shipper at the date of the filing of the bill.

Mr. *Eddis*, Q.C., and Mr. *Westlake*, for the Defendants, the bank:—

The transaction between *Haigh, Wilson, & Co.* and the bank does not amount to a release of the drawer of the bill. The letter is merely a request by drawees of a bill to the holders to defer presentment, and it goes on expressly to say: "We hold ourselves in every respect liable to you, on account of the said acceptances, as if the same had been regularly presented;" in other words, "Don't present the bills, and in consideration of your not presenting, we hold ourselves liable to you, just as if they had been presented." All that *Haigh, Wilson, & Co.* wanted was to avoid notarial protest. That is the whole arrangement. No time is fixed; and consistently with this, we might have presented the bills two days afterwards. Can it be said that this was such a binding contract as to release the drawer? *Philpot* v. *Briant* (2). All the rule amounts to is, that if you give time to the acceptor or indorsee, you shall not, in fraud of that contract, sue the drawer or indorsee: *Hall* v. *Cole* (3). Here there was no time

(1) Law Rep. 3 Ch. 588. (2) 4 Bing. 717.
(3) 4 A. & E. 577.

fixed, and no contract to release anybody. Our object was to assist in protecting the credit of *Haigh, Wilson, & Co.* There was nothing to prevent the drawer paying us, and taking his remedy against *Haigh, Wilson, & Co.* Nor has the drawer been prejudiced. We have sold the goods, and to that extent the drawer's liability is discharged; but we never contracted not to sue the drawer for the unpaid balance, or to forego any right against him. All we consented to do was to postpone presentment for a day, or a month, just as we pleased.

Besides, this proceeding is not an action on the bill. It is a suit to deprive us of the benefit of a collateral security. This balance was pledged to us to make good any deficiency on the part of the shipper. It represents goods which we had a right to sell, and the proceeds of which we had a right to apply first in payment of the £1200 bill, and then of other bills in our hands, drawn by the shipper of the goods. It is said that the policy is not included in the letter; but surely it would come within the general designation of "shipping documents." It is therefore a collateral security, and the rule applicable to actions on bills of exchange does not apply. Even if an action by us against the drawer should fail, our right to this balance is that of a creditor having recourse to his collateral security against his debtor: *Hitchcock* v. *Humfrey* (1); *Walton* v. *Mascall* (2); *Murray* v. *King* (3).

[The VICE-CHANCELLOR:—Suppose part of the goods had been burnt, but enough had come home safe to cover the bill, could you have claimed the policy moneys in respect of the burnt portion?]

Perhaps not; because no right to sell the goods would then have arisen. But to the proceeds of sale we are entitled. Here the goods have wholly perished, and we are entitled to the whole. We do not say that the policy moneys represent the goods for all purposes and under all circumstances; but that where, under the letter of hypothecation, there would have been a right to sell the goods, there the law puts the policy moneys in the place of the proceeds of sale. If the right to sell had not arisen, it might have been otherwise. If this were not so, what

(1) 5 Man. & G. 559. (2) 13 M. & W. 452.
(3) 5 B. & A. 165.

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was the meaning of the delivery of the policy by *Jaitha Vullubjee* to the bank? It must have represented some security, and that security was, that if a right of sale should arise, the policy moneys should represent the goods. *Berndtson* v. *Strang* (1) was an illustration of an instance where policy moneys would not represent goods. There it was the consignee who had insured, not the consignor and drawer of the bill.

The rule as to discharging a surety is confined to legal proceedings on a bill of exchange, and has no application to questions arising under the law of merchants. Here the fact remains that the bills have not been presented, and consequently there is no right of action against *Haigh, Wilson, & Co.* It does not follow that we have lost our collateral security against *Jaitha Vullubjee.* He has had full notice, for the re-drafts have been sent to him for his acceptance. They have not been met, and hence the moneys in our hands, representing the goods hypothecated to us, are applicable to cover them.

Mr. *Kay,* in reply.

Sir James Bacon, V.C., after some preliminary observations, continued:—

The transaction is simply this: A shipper in *India* draws a bill upon his consignees in *England;* he sells it upon the market in *India,* and accompanies it with the bill of lading, which is the only document that I know of. But it is stated that at the same time he deposited with the persons who bought the bill of him a policy of insurance against damage by fire to the cargo. Now, what is the meaning of that transaction? Without stopping to consider the terms in which it is expressed, it is this, and this only: "I have shipped to *England* goods that are at least worth the £1200 for which I have drawn; I give you, by means of the bill of lading, the power to secure to yourself the payment of that £1200 if the parties liable upon the bill do not pay it." Is there anything more than that in the contract between the parties? Is any other sum than £1200 in the contemplation of either of them—the man who buys, or the man who sells the bill? It is impossible to say that anything else entered into their contemplation. The only use

(1) Law Rep. 3 Ch. 588.

of the policy of insurance is to guard against any accident that may happen, by which the value of the goods shipped may be diminished, and to insure to the holder of the bill of lading that he shall have at least the value of the 100 bales of cotton which are shipped on board the vessel. That is the plain transaction, and it is so stated in the answer, if the answer be read without attaching more importance to the words than really belongs to them, or endeavouring to strain them beyond what, in my opinion, was the true intention of the parties and the true nature of the transaction. The statement in the answer is, that the shipper "at the same time handed to the said bank as security for the payment of the said draft the bills of lading of the said cotton, and the said policy of assurance." That was the real transaction between the parties, and the benefit of that, to the full, the Defendants, the bank, have had. The letter of hypothecation does not extend that in the slightest degree:—[His Honour read the first paragraph of the letter of hypothecation set out above, and continued:—] Then follows the agreement, which gives, first of all, power to the purchasers of the bill to insure if they think fit—it gives them power to deal during the currency of the bill in the way which is pointed out in the second paragraph. Then comes this:—[His Honour read the next paragraph, beginning, "I further authorize," and continued:—] The letter is confined in its terms, as well as entirely in its nature, to those bills amounting to £1200, and to those 100 bales of cotton which are mentioned in the document to which I have been referring. Upon what ground can it be said that, if by any accident beyond the terms of this contract a sum of money should come into the hands of the *Bank of Australia*, the bank were therefore at liberty to apply that money in satisfaction of any debt which the *India* merchant might owe to them? There is no ground whatever for any such pretence. The contract is clear, plain, usual, ordinary, open to no doubt or question. Nobody has questioned the right of the bank to have the bills which were mentioned in this memorandum satisfied, and they have been satisfied—not exactly in the mode here contemplated, but by means of the delivery to them of the policy of insurance, which was so delivered to them, only that they might have the bills paid when they arrived at maturity. It would be putting a construc-

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tion upon these words wholly at variance, not only with the intention of the parties, but with the very expressions themselves, if I were to hold that, by means of this transaction, this letter of hypothecation, and the policy of insurance which accompanied it, the bank were entitled to any more than the very sum which was expressed in the bills of exchange.

The case might be decided upon that point alone. That would be enough to justify the Plaintiffs in making the present demand. But another point has been suggested, arising out of the transaction with Messrs. *Haigh, Wilson, & Co.* Now I take the law to be perfectly clear, that if the holder of a bill of exchange drawn by a foreign or domestic drawer upon a man upon whom he has a right to draw, and who accepts the bill when it is tendered to him for acceptance, does not, when that bill becomes matured, present it for payment—although the rights of the holder against the acceptor continue, yet as against the drawer his rights are gone, by reason of his having extended the time, and so put the drawer in a totally different position from that which the law would otherwise hold him to be placed in, and which, according to the true nature of the transaction he was originally placed in.

Now what is this transaction? *Haigh, Wilson, & Co.*, having transactions with the bank, prevail upon the bank not to present for payment the particular bills. It is said that they desired to avoid the notoriety which might attend the protest. Why should the drawer of the bills be prejudiced by that? If that arrangement was a convenient one as between the bank and Messrs. *Haigh, Wilson, & Co.*, they must settle it for themselves. That the memorandum of the 3rd of December, 1870, is a plain agreement on the part of the bank to postpone for an indefinite time the money due upon the acceptances, according to the tenor of it, nobody who reads it can doubt. The agreement is this:—[His Honour read the letter of the 3rd of December, 1870, so far as it is set out above, and continued:—] If it be said that no definite time is to be gathered from this agreement—although I admit that there is no particular day, or month, or year mentioned in it—it is quite clear that it is a contract that the bank will not enforce the payment of the particular acceptances until the re-drafts have been made for the deficiencies upon the native mer-

chants, and the result of those drafts shall have been ascertained, and in the meantime the drafts themselves are pledged to or placed in the hands of the bank for collection by them of the moneys for which they are drawn. Then it goes on: "As further security for all our obligations to the bank, we assign to you all our interest"—in a certain contract which is not explained. That comes within the ordinary rule—a rule, as I understand, without exception—that if a holder of a bill, having a right to present it, when it arrives at maturity, neglects to do so, and gives time to the acceptor, the person who ought to pay the bill, he thereby discharges the drawer. That is a rule most reasonable and just in itself, when it is considered what the consequences upon the drawer may be, and how grievously his position may be altered, not only by the neglect of the holder, but by a contract such as this which the Defendants, the bank, chose to enter into upon this occasion. I think that upon that ground also the Plaintiffs are entitled to that which they ask by this bill.

Now cases were referred to in answer to this part of the case which I cannot help thinking have no real bearing upon it—the cases, I mean, of collateral security. If a man has, by an independent and separate contract, agreed that, in a particular event, namely, the non-payment of a sum of money at a particular time, he will be answerable for that payment, what has that to do with any formalities that may have been neglected or not properly enforced in the way of presenting the bills, if there were bills in the case, or of giving time for the payment of the money, if time has been given? In every one of the cases mentioned to me by Mr. *Eddis*, there was a plain collateral security; and the judgment of the Court went upon the terms, tenor, and effect of the collateral security, and excluded from the operation of that security all extraneous circumstances, and all that was not referable to the plain express contract between the parties. The policy of insurance I take to have been, not only from the words which are used, but in its very nature, simply a security that certain bills should be paid when they became due. They have been paid after they became due; the whole demand of the bank in respect of those bills—all that was contemplated by the letter of hypothecation—has been accomplished; the bank have had all they contracted

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to have, and all that they are entitled to have. To say that the proceeds of the policy of insurance are to stand instead of the goods is in contradiction of that principle of law which I gather from *Berndtson* v. *Strang* (1), where the main purport of the decision is to point out clearly that the goods themselves, and the policy effected in respect of damage which might happen to those goods, are in their nature distinct, and not to be confounded, and that one is not be taken for the other. The same thing is equally apparent here. There is no connection, either in the expressions of the document or in right reason or fair justice, looking at the matter as an ordinary mercantile transaction, between the policy of insurance, which was effected only to secure the payment of the bill of exchange, or to provide the means of paying the bill, and the surplus, which, if the goods had arrived safely, and had been sold, the bank might have made some claim to.

In my opinion the Plaintiffs succeed in their demand, and they are entitled to the £470 which is the balance of the policy of insurance, and for which alone this bill was filed.

Mr. *Kay* asked for interest at the ordinary mercantile rate from the time the money came to the hands of the bank.

After some discussion,

The VICE-CHANCELLOR said he would allow interest at 4 per cent.; and gave the Plaintiffs the costs of the suit.

Mr. *Ferrers*, for the assignee of *Jaitha Vullubjee*, asked for his costs.

The VICE-CHANCELLOR directed the Plaintiffs to pay his costs and add them to their own.

Solicitors: Messrs. *Markby, Tarry, & Stewart*; Messrs. *Linklater, Hackwood, Addison, & Brown.*

(1) Law Rep. 3 Ch. 588.

Applied. In re GALWAY'S WILL TRUSTS [1950] 1 Ch 1

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[1871 W. 276.]

V.-C. H. 1873 Nov. 19.

Bequest of Leaseholds—Notice to treat by Railway Company—Valuation—Death of Testator—Ademption—Right to Intermediate Rents—Wills Act (1 *Vict. c.* 26), *s.* 23—*Statute of Frauds.*

10 Ch 612.

W. W., by will in 1859, bequeathed leaseholds to his sister *A.*, and the residue of his estate to his sister *E.*, and in 1865 was served with a notice on the part of a railway company to treat for the purchase, under the provisions of their Acts, of the leaseholds for the purposes of their railway. Surveyors appointed by *W. W.* and the company, but not in writing, settled the value of the leaseholds, and the former verbally agreed to accept the sum named. *W. W.* died in February, 1869, the matter remaining in abeyance till April, 1870, when the sale was completed by the executor:—

Held, that the notice to treat, followed by the valuation of the surveyors, was, notwithstanding the *Statute of Frauds*, a valid contract; that there had been an ademption of the bequest to *A.*; but that *A.* was entitled to the rents which had accrued between the death of the testator and the completion of the purchase by the company.

Ex parte Hawkins (1) followed. *Haynes* v. *Haynes* (2) distinguished.

MOTION for decree.

William Watts, who died in February, 1869, by his will, dated the 6th of September, 1859, bequeathed to his sister, *Ann Watts* (the Plaintiff), her executors, administrators, and assigns, his two leasehold houses, Nos. 5 and 6, *Barossa Terrace, Cambridge Road*, with the appurtenances, she indemnifying his general estate against the lessees' liabilities in respect thereof; and he bequeathed all the residue of his estate to his sister, *Elizabeth Watts* (the Defendant), and appointed her his executrix. On the 9th of June, 1865, the *Great Eastern Railway Company* served the testator with a notice, dated the 1st of May in that year, that they required to purchase and take the said leasehold messuages for the purposes of the railways and works authorized to be made and constructed by the *Great Eastern Railway* (*Metropolitan Station and Railways*) *Act*, 1864, with which the *Lands Clauses Consolidation Act*, 1845, and the *Railways Clauses Consolidation*

(1) 13 Sim. 569. (2) 1 Dr. & Sm. 426.

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Act, 1845, were incorporated. The testator and the company appointed surveyors, but not in writing, and, after some delay in consequence of the financial position of the company, and negotiations between them, the value was settled at £365, and the testator agreed to accept that sum in preference to a debenture for £380 for three or five years, which the company offered him. As there was no probability of the purchase being shortly completed, the surveyors arranged that the testator should receive the rents until the completion of the purchase. Instructions to prepare an agreement in accordance with the terms mentioned above were sent by the company's surveyor to their solicitors, and the testator's surveyor made an entry of those terms in his diary; but it did not appear in evidence that the testator signed any agreement. The matter remained in abeyance until the 15th of December, 1869, when the solicitor of the company at that time sent to the testator's solicitor a draft agreement embodying the terms previously arranged, and making the testator the vendor; and it was, on the 4th of January, 1870, after an objection by him that it was unnecessary, and after an alteration making the Defendant the vendor, signed by the Defendant; and on the 11th of April, 1870, she assigned the premises to the company and received the purchase-money. The Defendant, after the testator's death, and before the completion of the purchase in April, 1870, received rents and profits amounting to the sum of £42 6*s.* 8*d.* The Plaintiff contended that the testator never agreed to any terms or conditions of sale; that the premises remained unconverted at the time of the testator's death; that they passed to her under the bequest in the will; and that, even if it should be held that there was a binding contract for sale and a conversion previously to the testator's death, still she was entitled to the purchase-money on the ground that the bequest passed whatever interest, whether the premises or a lien for the purchase-money, which the testator had therein or thereon at his death. The prayer of the bill was that the trusts of the will might, so far as they had not already been, be performed; and for declarations that the Plaintiff was entitled to the premises comprised in the bequest to her, or to the purchase-money and the rents which accrued before the completion of the sale, and to interest since that time, and to the costs of the suit.

The Defendant by her answer stated that she entered into no new agreement with the company; that there was a binding contract for sale and a conversion in the testator's lifetime; that she merely carried into effect the agreement which had been entered into between the testator and the company; and that she received and retained the purchase-money and rents for her own benefit as residuary legatee, on the ground that the bequest to the Plaintiff was wholly adeemed and taken away from her by the company having, previously to the testator's death, given him notice of their intention to purchase, and by their concluding the agreement to purchase the premises for the purposes of their undertaking.

Mr. *T. A. Roberts*, for the Plaintiff, submitted that there was not a complete and binding contract previously to the death of the testator. The mere facts of serving the testator with a notice to treat, and the agreeing upon a sum by the surveyors of the parties for the purchase-money, such surveyors not having been appointed by any writing, were not sufficient to convert the property. In the case of *Re the Battersea Park Acts, Re Arnold* (1) the owner of the land stated the price that he was willing to take, but died before the acceptance of the offer. The purchase was afterwards completed at that price, but it was held that there had been no conversion. *Haynes* v. *Haynes* (2) was a case in which it was held that a mere notice to treat did not constitute a contract by the owner for the sale of his property, and in *Richmond* v. *North London Railway Company* (3) the Master of the Rolls held that the company must proceed under their notice within a reasonable time. But in this case the notice was in 1865 and the completion of the purchase in 1870. Even assuming that there was a valid contract prior to the testator's death, it was put an end to, and a new contract was entered into by the Defendant, who signed the agreement of January, 1870. In *Harding* v. *Metropolitan Railway Company* (4) the company had been admitted into possession, and the Lord Chancellor, reversing the decree of the Master of the Rolls, held that the company must accept an assignment with the

(1) 32 Beav. 591.
(2) 1 Dr. & Sm. 426.
(3) Law Rep. 5 Eq. 352.
(4) Ibid. 7 Ch. 154.

595.

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usual covenants. *Frayne* v. *Taylor* (1) was a case where an owner of land had verbally agreed to sell, and afterwards died intestate before completion. The heir completed the contract, but it was stated that he might have repudiated it and taken as heir.

[The VICE-CHANCELLOR:—That case does not appear to me to have much application to the present.]

He had shewn that the Plaintiff was entitled to the purchase-money. Then as to the rent received after the testator's death, that, he submitted, also belonged to the Plaintiff.

[He also referred to *Ex parte Hawkins* (2), *Townley* v. *Bedwell* (3), and to the *Wills Act* (1 Vict. c. 26), s. 23.]

Mr. *Dickinson*, Q.C., and Mr. *Woodroffe*, for the Defendant, contended that the notice to treat, followed by the valuation by the surveyors, and the acceptance by the testator of the terms agreed upon by them, formed a complete and binding contract, and that the cases cited were in the Defendant's favour. They referred to *Haynes* v. *Haynes* (4), and to *Dart's* Vendors and Purchasers (5) and cases there cited.

Mr. *Roberts*, in reply, contended that there had been no agreement signed by the testator as required by the *Statute of Frauds*.

Mr. *Dickinson*, also in reply, submitted that in such a case it was not necessary, the company having power to take the property, and the agents of the parties having agreed upon terms which were accepted and acted upon.

SIR CHARLES HALL, V.C.:—

Putting out of view for the moment the *Statute of Frauds*, the case is this: The testator made his will some time before any negotiations with the railway company took place. He gave this property to the Plaintiff, and some time after was served with a notice to treat:—[The Vice-Chancellor then stated the facts set forth above, and continued:—]

(1) 33 L. J. (Ch.) 228. 10 Jun 1864
(2) 13 Sim. 569.
(3) 14 Ves. 591.
(4) 1 Dr. & Sm. 426–436. 7 Jun 1858
(5) 4th Ed. vol. i. p. 195.

Ultimately the testator determined to accept the sum of £365 for the premises. There was a clear agreement come to between the parties, and part of it was that the testator might continue in possession of the rents until the purchase should be completed. An actual agreement having, as a matter of fact, been come to that the premises should be taken by the railway company for £365, it has been argued that all that has been done must be held to go for nothing, because the *Statute of Frauds* has not been complied with. The answer to that is, it is not necessary, in such a case, that the contract should be in writing. If there be a contract established in fact, which has been come to in the ordinary way by the surveyors agreeing upon the sum to be paid, that is a sufficient contract for the purpose of considering that the premises have been converted under the provisions of the statute. That was the decision in the case of *Ex parte Hawkins* (1), in which the valuers signed the agreement merely; and Vice-Chancellor *Shadwell* said that although it was not a binding contract within the *Statute of Frauds*, yet he considered that there was that which was tantamount to it.

The case of *Haynes* v. *Haynes* (2), before Vice-Chancellor *Kindersley*, is also important; but is distinguishable from the present. In the judgment in that case Vice-Chancellor *Kindersley*, after expressing an opinion that the notice to treat served by the company does not constitute a contract by the landowner for the sale of his land, referred to *Ex parte Hawkins*, which, he said, did not rest on the notice to treat, but on a special contract; "for the price had been fixed by the surveyors of the parties, and the landowner had sent an abstract of his title."

Therefore, following the decision in *Ex parte Hawkins*, I hold that the sale of the premises must be considered as an ademption of the gift to the Plaintiff; and consequently the Plaintiff's case fails as to the purchase-money.

It was also argued that the Plaintiff, if not entitled to the purchase-money, is entitled to the sum which was received for rents between the death of the testator and the date of completion, because it was an interest remaining in the testator. The 23rd section of the *Wills Act* (1 Vict. c. 26) enacts "that no con-

(1) 13 Sim. 569. (2) 1 Dr. & Sm. 426.

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veyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." There is no authority which governs the present case. I think that these rents must be considered as an estate or interest which the testator had power to dispose of by will at his death, and that the Plaintiff is entitled to them. There will be no order as to the costs.

Solicitors for the Plaintiff: Messrs. *Lewis & Lewis.*
Solicitor for the Defendant: Mr. *Robert Voss.*

V.-C. H. 1873 Nov. 22.

PRITCHARD *v.* ROBERTS.

[1872 P. 184.]

Solicitor—Costs of establishing Infant's Title under 25 & 26 *Vict. c.* 67—*Costs of Partition Suit—Lien on Fund.*

The costs of proceedings under the *Declaration of Titles Act* on behalf of an infant, together with the costs of a partition suit and of a suit to obtain a declaration of lien:—

Held, to be costs for which the solicitor had a lien on the fund recovered.

THE Defendant in this suit, an infant, was entitled to one undivided moiety of a house in *Windmill Street*, but the title deeds to the property being lost, there was great difficulty in making out the title. The owner of the other undivided moiety, one *Proger*, was in possession of the premises, but refused to pay any rent to the Defendant for his moiety, though he offered, in case the Defendant could make a title, to purchase his interest. Under those circumstances, on the 2nd of February, 1870, the Plaintiff, who is a solicitor, presented a petition in the name of the infant, under the *Declaration of Titles Act*, 1862 (25 & 26 Vict. c. 67); and on the 9th of December, 1870, an order was made on the petition declaring the Defendant absolutely entitled to one undivided moiety in the pre-

mises. *Proger*, the owner of the other undivided moiety, still refused to recognise the Defendant's right, or to pay rent for the Defendant's moiety, and thereupon the Plaintiff, on the 11th of February, 1871, filed a bill in the infant's name against *Proger* for a partition or sale, and on the 16th of April, 1872, a decree in the suit was made for a sale of the Defendant's undivided moiety. *Proger* then offered to purchase the Defendant's moiety at such a price as should be fixed at Chambers, which the Chief Clerk ultimately fixed at £593 17*s.* 6*d.*, and that sum *Proger* paid into Court to the credit of the partition suit. The Plaintiff, the solicitor, then filed this bill, praying that it might be declared that the Plaintiff had a lien on the fund in Court for the costs incurred on the petition under the *Declaration of Titles Act*, of the partition suit, and of the present suit.

Mr. *Lindley*, Q.C., and Mr. *Samuel Dickinson*, for the Plaintiff:—

This bill is filed to obtain a declaration of the Plaintiff's lien upon the fund in Court under the general jurisdiction of the Court. The Plaintiff might have proceeded under the statute; but, in consequence of the case of *Bonser* v. *Bradshaw* (1), it was thought better to take the present proceedings, which he was clearly entitled to do: *Simpson* v. *Prothero* (2). The only question is as to the costs of the proceedings under the *Declaration of Titles Act;* but those costs were really incurred in the matter of the partition, inasmuch as without them it would have been impossible to have obtained a decree for partition. The order in those proceedings was, in fact, the evidence in the partition suit.

It is quite clear that these costs might have been recovered in an action at law against the infant: *In re Howarth* (3); and might be treated as necessaries: *Helps* v. *Clayton* (4).

Mr. *Karslake*, Q.C., for the infant, said he could see no ground for objecting to the order asked, though, of course, he could not consent.

[He referred to *Baile* v. *Baile* (5).]

(1) 4 Giff. 260. (3) Law Rep. 8 Ch. 415.
(2) 3 Jur. (N.S.) 711. (4) 17 C. B. (N.S.) 553.
(5) Law Rep. 13 Eq. 497.

V.-C. H. 1873 PRITCHARD v. ROBERTS.

SIR CHARLES HALL, V.C.:—

The costs of obtaining the declaration of title are in substance costs incurred in the partition suit. Moreover, in my opinion all these costs might, in a circuitous manner, be made to come out of the infant's estate. If the solicitor had sued the next friend of the infant for these costs and recovered them, the next friend might have recovered them against the infant. There must, therefore, be a declaration that the Plaintiff is entitled to a lien on the fund in Court for the costs of the petition, and of the two suits, as between solicitor and client, and an order that such costs be taxed and paid.

Solicitor for both Parties: Mr. *C. Pritchard.*

V.-C. H. 1873 *Dec.* 4, 6, 8,

LEESE *v.* MARTIN.

[1871 L. 146.]

Bankers' Lien—Deposit of Boxes and Securities with Bankers—Lunacy—Committees—Judgment and Charging and Garnishee Orders—Injunction.

Bankers who, according to the usual custom in *London* between bankers and stockbrokers, made, upon the security of share certificates and other property deposited with them, advances to a stockbroker for specific purposes, were held not to have a general lien on boxes and their contents deposited with them for convenience and safe custody by the same stockbroker, he keeping the keys of and having constant access to the boxes, and the bankers—mere gratuitous bailees—not knowing, till after he had by inquisition been found lunatic, the contents of them; but that the committees of the lunatic were entitled to have the boxes and their contents delivered up to them, notwithstanding that the bankers had obtained a judgment in an action for the payment of the balance due to them on the lunatic's banking account; and also certain charging and garnishee orders.

MOTION for decree.

The bill in this case was filed on the 18th of October, 1871 (amended in March, 1872), by *William Leese*, a person of unsound mind (so found by inquisition), by *Richard Leese*, one of the committees, and also by the two committees of the estate, and the object of it was to have delivered up to the committees by the Defendants, bankers in the city of *London*, a large box, and two

cash boxes and their contents. *William Leese* carried on business in the city of *London* as a stock and share broker. For some years prior to and at the time of being found lunatic, on the 8th of October, 1870, he employed the Defendants as his bankers, and they from time to time made him advances upon the security of divers deeds and documents deposited with them; and they allowed him while he had an account with them to keep at their banking house several boxes, in which he from time to time, for more safe and convenient keeping, deposited various deeds and documents, as well such as were entrusted to him by customers for purposes connected with his business, as others which were his own property, The Defendants never held the keys of any of the boxes, nor were they informed nor did they know what they contained, but the contents of all the boxes were from time to time, without let or hindrance on the part of the Defendants, removed and dealt with by *William Leese*, who had constant access thereto as he pleased. There were also allegations that the contents of the boxes were neither deposited with nor came to the hands of the Defendants in the course of their business as bankers; that the boxes were in their possession for safe custody only, and not as security for the repayment of any advances made by them; and not for any purpose which would entitle them, under any circumstances, to claim a lien thereupon, and that they were bound to deliver up the boxes and the contents thereof to the Plaintiff *William Leese* upon demand, whatever might be the state of his banking account with them.

There was set forth in the pleadings a correspondence between the solicitors of the parties in reference to the securities and documents which belonged to third parties, some of whom gave notice to the Defendants of their rights, but afterwards withdrew it; also in reference to those which belonged to *William Leese* beneficially, and also to a deed of transfer of a sum of stock in a railway company, which purported to have been signed by a Mrs. *Farrar*, and certain share certificates certifying that she was a registered holder of two sums of stock in the same railway company; but it is not necessary to state more than that the Defendants, in December, 1870, when they were proceeding to sell such stock, were informed that Mrs. *Farrar* asserted that the signature to the deed of trans-

V.-C. H. 1873 LEESE v. MARTIN.

fer was a forgery; that she had never authorized *William Leese* to sell or pledge such stock; that he had no right to or interest in it; and that the same was her property. Mrs. *Farrar* subsequently filed a bill, in February, 1871, against the Defendants and the Plaintiffs in this suit, praying for declarations in her favour in reference to such stock and certificates. That suit was, it was alleged, still pending. The correspondence between the solicitors and the object of that suit are sufficiently referred to in the judgment. The three boxes, the subject of this suit, were, by the direction of the Defendants, in defiance of the objections and protests of the Plaintiffs' solicitor, forced open on the 15th of May, 1871, on their premises, and the securities and documents which belonged to third parties were, with one exception, after objections made by the Defendants to hand them over to the committees—the Defendants alleging that they had had notice not to part with them—ultimately handed over to the parties to whom they belonged; but the Defendants, who claimed a lien for a balance due to them on *William Leese's* account, refused to deliver to the Plaintiffs the securities and documents which belonged to him. After the filing of the original bill, such securities and documents were, pursuant to an order in the cause, deposited at the Law Institution. The Plaintiffs alleged that they would suffer great damage unless the contents of the boxes and all other the property the subject of the suit should be given up to them in specie. The Defendants made use of the information which they had acquired by an affidavit which had been filed in the cause, and by opening the boxes to obtain various charging and garnishee orders against the shares, debts, and other property, the securities or documents of title for or relating to which were contained in the boxes. The Plaintiffs alleged that, but for the illegal detention by the Defendants of the said property, such charging and garnishee orders would not have been obtained; and they submitted that under the circumstances the Defendants ought not to be allowed to derive any advantage from their wrongful acts; and that compensation by way of damages ought to be awarded to the Plaintiffs for the loss which they had sustained. The suit was instituted with the sanction and approval of Lord Justice *James*, duly obtained in that behalf in the Matter of the Lunacy of *William Leese*, and the Plain-

tiffs prayed for a declaration that the Defendants were not entitled to any charge or lien upon the boxes, or any of the securities or documents which were contained therein, or upon any other documents held by them for safe custody, and that the same might be ordered to be delivered up to the Plaintiffs; for an injunction to prevent the Defendants from converting the said securities and documents; for a receiver; for compensation for the loss sustained in consequence of the unlawful acts of the Defendants; and for costs.

The Defendants by their answer stated that, being unable to obtain from the Plaintiffs, the committees of the estate, payment of the balance due to them from *William Leese*, they brought, in September, 1871, an action to recover the same; that on the 6th of December, 1871, they obtained judgment against *William Leese* for the sum of £1359 11*s.* 7*d.* debt, and £6 1*s.* 2*d.* costs, and that by virtue of such judgment, and under the provisions of 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, they obtained various charging and garnishee orders.

They denied that they agreed to deliver up to *William Leese* the boxes or the contents thereof upon demand, without regard to the state of his banking account with them, and that the contents were not deposited with them in the course of their business as bankers. They admitted that *William Leese* was allowed from time to time, without any hindrance on their part, to have access to and open the boxes, and to add or take from the contents thereof as he pleased; but they stated that at all such times *William Leese* was either not indebted to them, or only in an amount supposed by them to be more than covered by the securities deposited by him expressly by way of security. They also admitted that the keys were kept by *William Leese* before, and by the committees after, he became lunatic; that they did not know of the contents until the 15th of May, 1871, when the boxes were opened on their premises; and they claimed, independently of their rights under the judgment, and charging and garnishee orders, a general lien for the full amount due to them upon all such of the securities or other contents of the boxes at the date of the inquisition, and since deposited at the Law Institution, as belonged to *William Leese* beneficially.

The evidence in the case is fully referred to in the judgment.

V.-C. H. 1873 LEESE v. MARTIN.

Mr. *Dickinson*, Q.C., and Mr. *Ingle Joyce*, for the Plaintiffs:—

The bankers have, notwithstanding the judgment and the charging and garnishee orders which they have obtained, no justification either in law or in fact for the retention of these boxes and their contents. The question here is one of law. If it be one of fact there is no evidence of any custom, though a custom has been alleged by the Defendants, who took the boxes and their contents for safe custody only in their strong room because Mr. *Leese* was their customer. The boxes were not deposited as security, for the Defendants state that they did not know what the contents were, and they admit that the keys remained in the hands of the depositor, and, therefore, they had no right to a lien. The law merchant applicable to bankers is clear, but it has nothing to do with this case, which is one of wrongful detention; for if there was not an express contract, there was an implied one to deliver the boxes and contents up to *Leese*, and that being so, the Plaintiffs ask for the delivery up of the whole of the documents to them; that the Defendants may be ordered to pay the costs of the suit; and for an inquiry as to what damages they have sustained in consequence of such wrongful detention.

[The VICE-CHANCELLOR:—The allegations in reference to loss sustained are too general.]

Though there is no evidence of any actual loss, still there is evidence that certain persons have threatened actions to compel the delivery up of securities belonging to them; and further, the debts which are due to the estate could not be received in consequence of such detention, and therefore there ought to be some inquiry as to whether any damages have been sustained.

[They referred to *Davis* v. *Bowsher* (1); *Jones* v. *Peppercorne* (2); *Inman* v. *Clare* (3); *Jeffryes* v. *Agra and Masterman's Bank* (4); *Brandao* v. *Barnett* (5); *Bock* v. *Gorrissen* (6); *Wylde* v. *Radford* (7); *Biddle*] v. *Bond* (8); *Doe* v. *Oliver* (9); *Giblin* v.

(1) 5 T. R. 488.
(2) Joh. 430.
(3) Ibid. 769.
(4) Law Rep. 2 Eq. 674.
(5) 12 Cl. & F. 787.
(6) 2 D. F. & J. 434.
(7) 9 Jur. (N.S.) 1169.
(8) 6 B. & S. 225.
(9) 2 Sm. L. C. 6th Ed. 768, 769.

McMullen (1); *In re United Service Company, Johnston's Claim* (2); and *Bellamy* v. *Marjoribanks* (3).]

Mr. *Greene*, Q.C., and Mr. *Stevens*, for the Defendants:—

The detention of the boxes and securities was quite proper. So far as such securities were not the property of *William Leese* beneficially, and in respect of which he was a mere gratuitous bailee, having only a special or qualified property personal to himself, and for a particular purpose which he could not carry out after he became lunatic, the committees had no right to have them delivered up to them. They had no interest in the property which belonged to *Leese's* customers, who might have brought actions against the Defendants for the recovery of their property. *Buxton* v. *Baughan* (4), and *Cooper* v. *Willomatt* (5), *Fenn* v. *Bittleston* (6), and *Addison* on Contracts (7), shew that if the Defendants had handed the property over to the committees, and they had improperly dealt with it, the customers might, in respect of any loss, have maintained actions against the Defendants, but not against the committees. The Defendants always considered that all the securities which they received from *William Leese* would be liable for any just and lawful debt which might be due to them from him, and if the law should be held to be otherwise, great injustice would be done. The decisions in *Davis* v. *Bowsher* (8), and the other cases which have been referred to, are clearly in the Defendants' favour. The Defendants also rely upon the doctrines at law applicable to general lien, which they have asserted in the proper way: *Jones* v. *Peppercorne* (9). If the Defendants did wrongfully detain the boxes, the Plaintiffs should have taken proceedings at law in detinue or trover to test their right; but they did not adopt that course, and for a good reason, that the Defendants became liable to actions by the true owners. But the really important question in this case is, whether the Defendants had or had not a general lien originally, or at the time when the bill

(1) Law Rep. 2 P. C. 317.
(2) Ibid. 6 Ch. 212, 217.
(3) 7 Ex. 389.
(4) 6 Car. & P. 674.
(5) 1 C. B. 672.
(6) 7 Ex. 152, 159.
(7) 4th Ed. p. 526, *et seq.*
(8) 5 T. R. 488.
(9) Joh. 430.

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was filed. Even if they had not at either period such a lien, it is quite certain that they were entitled to it by virtue of their judgment, and the charging and garnishee orders. The bill was filed to prevent those orders from being enforced. The case principally relied upon by the Plaintiffs is that of *Brandao* v. *Barnett* (1); but the House of Lords in that case left the law just as it was before. That law is clear enough, and there is no doubt that bankers have a general lien upon all securities; indeed, upon all property, no matter what kind, deposited with them in the ordinary course of business, except there be an agreement, express or implied, to the contrary. Here express contract there was none. It is said there was an implied contract; but was there one, and if so, was it inconsistent with general lien? The case of *Brandao* v. *Barnett* did not so decide. It was said that these boxes and contents were not deposited with the Defendants in the ordinary course of business; but it is as much the ordinary course of bankers to receive and take care of boxes and contents placed in their strong rooms for safe custody, as anything else done by them, and that is shewn by the decision in *Giblin* v. *McMullen* (2). Though safe custody only may have been the purpose of *William Leese*, there was no contract to that effect. The Defendants do not claim a greater right than to hold the property until the balance due to them be paid. Can it be seriously contended that the Defendants are to have no benefit either from the judgment or the charging and garnishee orders obtained by them? There can be no pretence for saying that the Defendants ought not to have the benefit of the judgment, and as to the orders, the Defendants must be put in the same position as if the property had remained in their banking house. As to the costs of the suit, the Defendants, whether they were right or wrong in having the boxes opened on their premises, ought not to be made to pay any, as the conduct of the committees in objecting to the boxes being opened was, as the correspondence between the solicitors shews, both vexatious and unreasonable; but looking at all the circumstances of the case, the bill ought, it is submitted, to be dismissed with costs.

The VICE-CHANCELLOR intimated that the question of damages

(1) 12 Cl. & F. 787. (2) Law Rep. 2 P. C. 317.

was the only one on which he wished to hear any further argument on the part of the Plaintiffs, and that he did not feel inclined to direct any inquiry in reference thereto, and therefore the reply was waived.

SIR CHARLES HALL, V.C., after stating the object of the suit; that the defences to it were substantially three—first, that the Defendants could not safely part with the boxes, or at all events such of the contents thereof as belonged to third parties, because they had had notice from such parties, or were aware of their interests; secondly, that the Defendants had a lien on such of the contents of the boxes as belonged to *William Leese* beneficially, such boxes and their contents having come, as they alleged, into their possession in the ordinary course of their business as bankers; and, thirdly, that the Defendants having obtained certain charging and garnishee orders prevented the Plaintiffs having relief; and that the facts of the case were not in dispute, continued:—

The nature of the dealings and transactions between the Defendants and *William Leese* is explained by the evidence of Mr. *Lightbody*, who was for more than eight years a clerk in the employment of *William Leese*. He, in the second paragraph of his affidavit, states that the Defendants were the bankers of *William Leese*, and that they, according to the usual custom between bankers and stockbrokers, were in the habit of making advances to him upon the security of share certificates and similar property deposited with them for that specific purpose; that these were from account day to account day, and that it was understood that if they were not repaid the Defendants were to be at liberty to dispose of the securities so lodged with them as security, and to repay themselves out of the proceeds; and in the third paragraph of the same affidavit he states that the Defendants allowed *William Leese*, while he had an account with them, to keep at their banking house several boxes, in which he, from time to time, for more safe and convenient keeping, deposited various deeds and other documents, as well such as were entrusted to him by customers for purposes connected with his business, as others which were his own property; that the Defendants did not keep the keys of these boxes or any of them, nor were they

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informed what the same contained, but that the contents of the boxes were from time to time, without let or hindrance on the part of the Defendants, and in fact without any reference to them, removed and dealt with by *William Leese*, who kept the keys and had constant access to the boxes as he pleased; that in fact these boxes were kept at the banking house of the Defendants merely for the convenience of *William Leese*, and that the same were in the possession of the Defendants for safe custody only, not as security for the repayment of, or with any reference whatsoever, so far as he was aware, to any advances made by the Defendants; that for such advances specific securities were lodged; that no advances were made by the Defendants upon the securities or property contained in the said boxes; that the Defendants never, in any manner, claimed any control over them; that the boxes were opened almost every day, and the contents inspected, added to, or taken away, without any reference to the Defendants; and that he knew, from having personally, on many occasions, himself opened the said boxes and placed securities in them, or taken securities out of them, as the case might be.

William Leese, having been found a lunatic, the Plaintiffs, the committees, applied to the Defendants for the delivery up to them of the boxes. In the first instance the Plaintiffs, through their solicitor, represented that the contents belonged to customers of *William Leese;* but that was not altogether accurate, for though two boxes did belong to customers, and as to which there is no question, they having been delivered up before the bill was filed, the others contained documents which belonged in part to *William Leese* and in part to his customers, amongst whom were Messrs. *Barnetts & Co.* That inaccuracy of statement I consider unimportant. The Defendants, by their solicitors, insisted that the documents belonging to the customers of *William Leese* should be delivered to such customers, including Messrs. *Barnetts & Co.*, while, on the other hand, the Plaintiffs, the committees, by their solicitor, insisted that they ought to be delivered to them. Messrs. *Barnetts & Co.* gave notice to the Defendants of their claim, but on the 13th of April, 1871, they, by letter to the Defendants, withdrew their notice. In reference to such letter the Defendants, in their answer, after admitting the withdrawal of the notice by

Messrs. *Barnetts & Co.*, state that it was "only upon the assumption that the securities so claimed by them should be handed over to them by the committees of the estate of *William Leese*, which could only be done by opening the said boxes and taking therefrom the securities as claimed by Messrs. *Barnetts & Co.*" But it appears to me that the withdrawal of the notice was without any qualification whatever. It was contemplated, no doubt, that the documents claimed by Messrs. *Barnetts & Co.* would be delivered up to them, they being quite ready to rest upon the authority obtained from the Master in Lunacy. Another person made a claim, but that was withdrawn in September, 1871, and the Defendants were informed thereof before the bill was filed. It is clear that the claims which had been made by notices given to the Defendants were all disposed of previously to the filing of the bill in October, 1871, and that there was no impediment to the delivery up to the Plaintiffs, the committees, of the three boxes, by reason of any such claims, yet the Defendants, in the 37th paragraph of their answer, after stating that they had not received any notices, except those referred to, from any persons claiming the securities, or property or other the contents of the boxes, the subject of the suit, submit that, under the circumstances, they could not with safety or properly hand over to the committees of the estate the contents of the boxes, they having, by opening the boxes, discovered that, contrary to what had been represented to them, such contents comprised securities belonging to *William Leese*, and property belonging to other persons, in which, so far as they knew, *William Leese* had no interest. The notices of the interests of those other persons did not, however, at any time create any such impediment; and it is to be observed that the Defendants, in a paragraph of their answer, already referred to, admit that Messrs. *Barnetts & Co.'s* documents were to be delivered to them by the Plaintiffs—the committees. The law in reference to such a case is laid down in *Biddle* v. *Bond* (1). According to that decision, one who has received property from another as his bailee, agent, or servant, must restore or account for that property to him from whom he received it, and it is not enough that the bailee has become aware of the title of a third person, or that an

(1) 6 B. & S. 225.

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adverse claim is made upon him, so that he may be entitled to an interpleader. The estoppel, however, ceases when there is an eviction by title paramount. I do not think there is any ground for contending that, as regards the documents belonging to the customers of *William Leese*, the delivery of the boxes to the committees would not have been as effectual a discharge to the Defendants as a delivery to *William Leese* had he not become of unsound mind. It has been contended that the Defendants, if they could have safely delivered the boxes to *William Leese*, the lunatic could not safely deliver them to his committees; but I consider that the committees' duty was to obtain possession of the boxes which the lunatic had deposited, and the customers of the lunatic must, I think, be taken to have authorized the placing of their securities in the boxes of the lunatic, which boxes, when deposited with the bankers, would be considered to be, and would be, dealt with as the lunatic's own boxes and property, and, as a consequence, would have to be handed over to the committees should *William Leese* become lunatic. Mr. *Greene* referred to some cases to shew that if a bailee parts with the property in his possession, the principal may bring an action of trover against the person to whom such property has been so delivered; but these authorities are not at all opposed to the rule of law as laid down in the case to which I have referred. The first defence of the Defendants, therefore, altogether fails; but before leaving this part of the case I ought, I think, not to pass over what took place upon the 15th of May, 1871, in reference to the opening of the boxes by the Defendants. The Plaintiffs' solicitor wrote objecting to the right of the Defendants to open the boxes, and I think that the course adopted by the Defendants in opening the boxes was unjustifiable. The Plaintiffs had a right to object to the opening of the boxes, and to require them to be delivered up to them, unless indeed the Defendants had the lien claimed by them; and I now proceed to consider the argument on the part of the Defendants, that they had a general lien on such of the contents of the boxes as belonged beneficially to *William Leese*.

The evidence of Mr. *J. B. Martin* and Mr. *Lightbody*, to which I have already referred, that the boxes in question were only deposited for safe custody, is clear; and that the bankers, there being

no special duty undertaken by them or contract entered into with them in reference thereto, or their contents, were merely gratuitous bailees, seems to me to be also clear, according to the decision in *Giblin* v. *McMullen* (1), there not being here, as in *In re United Service Company, Johnston's Claim* (2), any arrangement for the bankers receiving dividends or income payable on any of the securities contained in the boxes. The bankers being merely gratuitous bailees, and *William Leese* being allowed to open the boxes from time to time, and to come and take them away, how can the Defendants maintain their alleged lien? They had nothing to do with the contents of the boxes in the way of receiving either principal or income. They were wholly ignorant as to what the boxes contained. The lien, if any, could not extend to such of the documents as belonged to *William Leese's* customers. The Defendants never have asserted such a lien in any other case, and they are not able to mention any case in which such a lien has been asserted by any other person. Mr. *Lightbody's* evidence negatives the assertion of any such lien in any other case. The Defendants, relying as they do on the general law that a bailee has a lien on the securities of his customer coming into his possession in the course of his business as banker, say that the boxes did come into their possession as bankers, in the course of their business as bankers, because they and other—not all other—bankers in *London* do allow their customers to deposit boxes in their strong rooms. But this statement falls short of alleging a general custom applicable to all bankers, or even to all bankers in *London*, and I therefore apprehend that the Defendants must now allege, and clearly prove, a special custom. That, however, they have not done: and for this I refer to *Bellamy* v. *Marjoribanks* (3). The answer does not state any facts from which the existence of a lien can be implied. Many authorities have been referred to in the course of the arguments, but I think it unnecessary to examine them all in detail. The general rule as to a banker's lien is clear, and forms part of the law merchant, of which the Court takes judicial notice. The previous authorities were, as observed by Vice-Chancellor *Wood* in *Jones* v. *Peppercorne* (4),

(1) Law Rep. 2 P. C. 317.
(2) Ibid. 6 Ch. 212.
(3) 7 Ex. 389.
(4) Joh. 430.

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all examined in the case of *Brandao* v. *Barnett* (5). That case was a much stronger one in favour of the bankers than the present, because there the exchequer bills were taken out of the box and were in the bankers' hands, and they received the interest on them and exchanged them. It was admitted in the argument in that case—and such admission was approved in the judgment—that the original bills in the box were not subject to a lien, and the case of the Respondents was rested on the distinction that the exchequer bills had been taken out of the box and placed in the bankers' hands. That case is undistinguishable from the present in any particular favourable to the Defendants, and it governs this case. I therefore hold that the Defendants' defence, founded on the lien claimed by them, fails. There were some subsequent authorities cited which do not, I think, in any way tend to shew that the present case is not governed by the principle laid down in the case of *Brandao* v. *Barnett*, which, being a decision of the House of Lords, I must follow. Independently of authority, I should have come to the same conclusion. It was contended that this case is not distinguishable from that of securities in a sealed-up parcel, and as to that I say I do not think it is, and that were a sealed-up parcel deposited in these boxes in the present case, such parcel would not be subject to the bankers' general lien. It was endeavoured to aid the Defendants' contention by a reference to the fact of the Defendants having had placed in their hands as a security, by *William Leese*, an alleged transfer of railway stock belonging to a Mrs. *Farrar*, the signature to which transfer is alleged to have been a forgery; but this contention is entitled to no weight whatever. Assuming the signature to the transfer was a forgery, that did not entitle the Defendants to assert a lien on something else upon which they had not a lien by contract or by custom.

The remaining defence of the Defendants is that of having obtained charging and garnishee orders. Now as to these the Defendants, in a schedule to their answer, set forth a list of them, and they submit that they ought not to be required to set forth further than they have done when they acquired the requisite knowledge for obtaining such orders. I think it clear that the Defendants, to

(1) 12 Cl. & F. 787.

obtain these orders, availed themselves of an affidavit that one of the Plaintiffs in the cause filed (which affidavit never would have been filed had the Defendants not rendered this suit necessary), and of the information derived by them from their having opened the three boxes, and I cannot allow them to set up orders so obtained as an answer to relief to which the Plaintiffs would, but for the orders, be entitled. The Plaintiffs by their bill ask for damages in addition to the delivery up of the documents, but under the peculiar circumstances of this case—*William Leese* having become lunatic—there is not, I think, evidence of any damage entitling the Plaintiffs to an inquiry to ascertain what it is, and to assess the compensation in reference thereto. I therefore declare that the Defendants are not entitled to a lien upon these three boxes or any of the contents thereof, and I order that such three boxes, with their contents, be delivered up to the Plaintiffs, the committees; that the Defendants, if necessary, do concur in such delivery up; that the Defendants be restrained by the order and injunction of this Court from taking any proceedings upon the charging and garnishee orders in the pleadings mentioned; and that the Defendants do pay to the Plaintiffs their costs of this suit, including any costs which may have been occasioned by depositing the boxes at the Law Institution. There is no specific prayer in the bill for such an injunction, but I think a case has been sufficiently made out for it; but it is not to extend to prevent the Defendants from taking other or new proceedings for enforcing their judgment as they may be advised.

Solicitor for the Plaintiffs: Mr. *John Frost.*
Solicitor for the Defendants: Mr. *Charles William Stevens.*

V.-C. H.
1873.
Dec. 13.

RICHARDS *v.* GODDARD.

[1871 R. 99.]

Practice—Cross-Examination of Witness—Production of—Payment of Expenses under Rule 19 *of the Order of* 5*th Feb.*, 1861.

The party on whose behalf a witness gives evidence, if required by the other side to produce him for cross-examination, is bound in the first instance to pay such witness his reasonable expenses, even though he may be out of the jurisdiction.

THIS was a motion on the part of the Plaintiff that the affidavits of *Frederick Oliver*, sworn and filed on the 9th of January, 1872, and the 23rd of April, 1872, and the affidavit of *F. J. Field*, filed the 22nd of April, 1872, might be used as evidence on behalf of the Plaintiff, notwithstanding that the said witnesses had not been produced for cross-examination before the Examiner. The bill was filed by the Plaintiff, who was lessee of certain land at *Wimbledon, Surrey*, on which he had erected eleven houses, called *Ashbourne Terrace*, to compel the Defendant specifically to perform an agreement into which, it was alleged, he had entered with the Plaintiff in June, 1869, not to erect or maintain a certain boundary wall more than seven feet high. The Defendant had recently raised the said wall to the height of fifteen feet, and had refused to reduce it, whereupon this bill was filed. The Plaintiff filed his affidavits with a view to set the cause down on motion for a decree, and on the 26th of March, 1872, the Defendant, by his solicitors, gave notice to the Plaintiff to produce his witnesses for cross-examination before the Examiner on the 24th of May then next. The time was subsequently extended to the 5th of June, 1872. It appeared, from the affidavit of the Plaintiff's solicitor, that *Field* had left *England*, and was believed to be in *Kansas*, and alive; and that *Oliver* had left his home, and his place of abode was not known to the Plaintiff; but the Plaintiff promised to produce the two witnesses for cross-examination, if the time were extended beyond the 5th of June, upon payment by the Defendant of

Best semble when party produces the witness he is entitled to repayment of the amount of the cross examination Richards v. Goddard 1871 R. 10 Ch. 208. S.W.

the reasonable expenses of so producing them. To this the Defendant did not assent, and the Plaintiff then served this notice of motion.

Mr. *Morgan*, Q.C., and Mr. *C. Browne*, for the Plaintiff:—

The question at issue is whether the party requiring the production of a witness for cross-examination is bound to pay him his reasonable expenses in the first instance, or whether the party producing such witness is himself bound to make such payment. It is quite clear that unless such reasonable expenses are paid, the witness is not bound to attend: *Brocas* v. *Lloyd* (1). Under the old practice adopted from the common law, the Defendant would have been bound to tender the witness his expenses: but then came the Order of the 5th of February, 1861, rule 19, which provided that where an opposite party required to cross-examine a witness who had given evidence, it should not be necessary for such opposite party to procure the attendance of such witness, but might serve upon the party who filed such affidavit or examined such witness, a notice requiring the production of such witness for cross-examination . . . and that unless such witness were produced his evidence should not be used, unless by special leave of the Court. Then followed these words: "The party producing such witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses shall be ultimately borne as the Court shall direct." Unless the party seeking to cross-examine pays the costs prior to such cross-examination, he cannot be said to pay the expenses in the first instance. Moreover, if he ultimately decline to use the right of cross-examination, how are the expenses to be recovered? or even suppose he does cross-examine, and dies, or becomes bankrupt, the expenses can never be recovered at all.

[They cited *Morgan's* Chancery Orders (2).]

Mr. *Dickinson*, Q.C., and Mr. *Begg*, for the Defendant, were not called on.

(1) 23 Beav. 129.

(2) 4th Ed. pp. 186, 191, 626, 627.

V.-C. H. 1873 RICHARDS v. GODDARD.

SIR CHARLES HALL, V.C.:—

The practice has always been to consider a witness under the dominion of the party on whose behalf he gives evidence. It is certainly possible that some of the inconveniences suggested by Mr. *Morgan* might arise if the party producing a witness were to pay his expenses in the first instance; but exactly the same inconveniences might arise if the opposite construction were adopted. I must hold, therefore, that the party required to produce the witness for cross-examination must pay in the first instance such witness's reasonable expenses. The motion, therefore, is wrong, and must be refused with costs.

Solicitor for the Plaintiff: Mr. *Thomas Wells.*
Solicitor for the Defendant: Mr. *Charles Roberson.*

In re BURNHAM NATIONAL SCHOOLS.

M. R.
1873
Dec. 6.

Charity Commissioners—Appointment of New Trustees—Jurisdiction—Contentious Case—National School—Transfer to School Board—Discretion of Charity Commissioners—6 & 7 Will. 4, *c.* 70, *s.* 3—4 *& 5 Vict. c.* 38, *s.* 7—*Charitable Trusts Act,* 1853 (16 *& 17 Vict. c.* 137), *ss.* 28, 32, 46—*Charitable Trusts Act,* 1860 (23 *& 24 Vict. c.* 136), *ss.* 2, 5—*Elementary Education Act,* 1870 (33 *& 34 Vict. c.* 75), *ss.* 2, 23.

The Charity Commissioners may, if they think fit, exercise the jurisdiction conferred on them by the *Charitable Trusts Act,* 1860, in contentious cases.

Dictum of Lord *Romilly,* M.R., in the case of *In re Hackney Charities* (1) not followed.

Where the site of a National School founded in connection with the Church of *England* was, under the powers of the Act 6 & 7 Will. 4, c. 70, s. 3, and 4 & 5 Vict. c. 38, s. 7, conveyed to the joint rectors for the time being of the parish in which the school was situated, as sole trustees:—

Held, that the Charity Commissioners had jurisdiction to appoint new trustees; that such trustees must be members of the Church of *England;* but that it was no objection to the exercise of the jurisdiction that the proper majority of the trustees might, under the provisions of the *Elementary Education Act,* 1870, transfer the school to a school board.

The Court of Chancery will not interfere with the discretion of the Charity Commissioners in selecting new trustees unless in cases of gross and palpable miscarriage.

THIS was a Petition under the *Charitable Trusts Acts,* 1853, 1855, and 1860, presented by the Rev. Dr. *Bates,* one of the two joint rectors of the parish of *Burnham Ulph,* in the county of *Norfolk,* praying for the discharge of an order of the Charity Commissioners, dated the 1st of April, 1873, whereby three new trustees of the National School in that parish were appointed.

By a deed dated the 3rd of December, 1838, a piece of land adjoining the churchyard of *Burnham Ulph,* and forming part of the glebe land of the rectory, was, under the powers of the statute 6 & 7 Will. 4, c. 70, and with the consent of the bishop of the diocese, conveyed to the two rectors of the parish, and their successors, rectors of the same parish, upon trust to permit the erection of a school and schoolmaster's house thereon, which school was to be for ever united to the *National Society for Promoting the Educa-*

(1) 34 L. J. (Ch.) 169.

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tion of the Poor in the Principles of the Established Church throughout England and Wales, and was to be conducted in conformity with the principles of that institution, and towards the advancement of its ends and designs.

In 1851 a further piece of glebe land was conveyed, under the powers of the statute 4 & 5 Vict. c. 38, to the two rectors and their successors, rectors of the parish, upon similar trusts.

Dr. *Bates* had contributed largely, both by his personal exertions and pecuniarily, towards the erection of the school; but for about sixteen years previously to 1871, the Rev. *G. G. Hayter*, the other rector, took the more active part in the management.

In August, 1871, the office of schoolmaster fell vacant, and the rectors were unable to agree in appointing a new master. In consequence of such disagreement, the school remained closed until subsequently to the 18th of April, 1873.

In November, 1871, the parish elected a school board, of which Mr. *Hayter* was one of the members, and Mr. *Blyth* the chairman. The board shortly afterwards applied to Dr. *Bates* and Mr. *Hayter* to transfer the school to the board. Mr. *Hayter* was willing that this should be done, but Dr. *Bates* refused to concur.

On the 9th of July, 1872, eight of the landowners in the parish presented a memorial to the Charity Commissioners, asking that three additional trustees of the school should be appointed. Dr. *Bates* opposed the application, but ultimately, on the 1st of April, 1873, the Commissioners made the order now complained of, appointing Mr. *Blyth*, Mr. *Mitchell*, and Mr. *Overman* additional trustees. All three were members of the Church of *England*, and the appointment of Mr. *Mitchell* had been suggested by Dr. *Bates*.

At a meeting of the trustees held on the 18th of April, 1873, it was resolved (Dr. *Bates* alone opposing) that the school should be transferred to the school board.

The present Petition was presented in July, 1873, and alleged that the appointment of new trustees was not sought *bonâ fide*, but merely with a view of procuring the transfer of the school to the board. The Petition was served on the Attorney-General, and on Messrs. *Blyth*, *Mitchell*, and *Overman*.

The Rev. Mr. *Hayter* and the three new trustees made each an affidavit containing a statement to the effect that the deponent

was a member of the Church of *England*, and would have preferred to have the school carried on upon the voluntary principle and in connection with the church, but that he believed it was impossible to raise the necessary funds for the purpose. Messrs. *Mitchell* and *Overman* respectively stated that they were not, previously to their appointment as trustees, pledged to transfer the schools to the school board.

Sir *R. Baggallay*, Q.C., and Mr. *Batten*, for the Petition:—

First: The Charity Commissioners had no jurisdiction in this case. By the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), s. 28, a Judge of the Court of Chancery is empowered in certain cases to make at Chambers orders which could previously have been made only on information; and sect. 32 confers similar powers in all other cases on the County Court Judges. By the *Charitable Trusts Act*, 1860 (23 & 24 Vict. c. 136), s. 2, the Charity Commissioners are empowered to make such effectual orders as, previously to the passing of that Act, might have been made by any Judge of the Court of Chancery sitting at Chambers, or by a County Court Judge, for the appointment or removal of trustees of any charity; but sect. 5 provides as follows: "The board shall not exercise the jurisdiction hereby vested in them in any case which, by reason of its contentious character, . . . they may consider more fit to be adjudicated on by any of the judicial Courts." That section was held by Lord *Romilly*, in the case of *In re Hackney Charities* (1), to exclude the jurisdiction of the Commissioners in contentious cases, of which this is clearly one. It is true Lord *Romilly's* decision in that case was reversed on appeal (2), but only on the ground that the party seeking to discharge the order of the Commissioners had no *locus standi*.

Secondly: If the Commissioners had any jurisdiction at all, still they had only such jurisdiction as the Court of Chancery had; and the Court of Chancery could not, under such circumstances as exist here, appoint additional trustees. By 6 & 7 Will. 4, c. 70, s. 3, and 4 & 5 Vict. c. 38, s. 7, under which the site for this school was given, the first trustees are to be named by the bishop of the diocese; the bishop has chosen to appoint as trustees the joint

(1) 34 L. J. (Ch.) 169. (2) 4 D. J. & S. 588.

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rectors of the parish, who form a corporation having perpetual existence. There is, therefore, no need, and no power, to appoint additional trustees. If the Court could make any order at all, it would be only for the removal of the existing trustees and the substitution of new ones.

Thirdly: The *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), which is to be construed as one Act with the *Charitable Trusts Act*, 1860 (see sect. 1 of the latter Act), expressly provides as follows, sect. 46: "Nothing herein contained shall diminish or detract from any right or privilege which by any rule or practice of the Court of Chancery, or by the construction of law, now subsists for the preference or the exclusive or special benefit of the Church of *England*, or the members of the same church, in settling any scheme for the regulation of any charity, or in the appointment or removal of trustees, or generally in the application or management of any charity." Now, the effect of appointing these trustees has been to convert a Church of *England* school into an undenominational school, and thus diminish or detract from the rights of the Church of *England*. This is contrary to the express declaration of the original deed of trust, which the Court always observes as far as possible: *Attorney-General* v. *Caius College* (1).

Fourthly: The appointment of Mr. *Blyth*, at least, was improper, inasmuch as previously to his appointment he was pledged to transfer the schools to the school board.

Mr. *Hemming*, for the Attorney-General, was not called upon.

SIR G. JESSEL, M.R.:—

This is an appeal from an order of the Charity Commissioners, and, as has been correctly stated by Sir *Richard Baggallay*, it raises some questions of public interest, as well as other questions which appear to be of considerable private interest to the two clergymen of this parish, to whom, perhaps, a portion of one of *Virgil's* lines may be very fairly applied—"*Tantæne animis cœlestibus iræ?*"

The public questions are three. It was said, first, that this order, which is an order to appoint additional trustees of a charity,

(1) 2 Keen, 150.

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ought not to have been made, because this was a contentious case, and that the Charity Commissioners have no jurisdiction to decide contentious cases. That was founded on the 5th section of the *Charitable Trusts Act*, 1860, which is this:—[His Honour read it:—] The meaning of that section I should have thought to be plain and obvious. It is that the Charity Commissioners should not be compelled to take upon themselves the exercise of the jurisdiction conferred by the Act in any case in which they considered that it could be so much better dealt with by a judicial Court that it would be improper for them to exercise that jurisdiction. It was not that they might decline the jurisdiction altogether in any case in which they might consider they ought not to exercise it—that would have enabled them to repudiate the jurisdiction—but it was that they might decline to exercise it in the cases which, for the reasons named, or for other reasons (meaning for special reasons of some kind, probably of a similar kind), they might consider more fit to be adjudicated on by a judicial tribunal. But if the Charity Commissioners considered they ought to exercise the jurisdiction, this section, it appears to me, did not interfere with it at all. I find, however, that in the case of the *Hackney Charities* (1) Lord *Romilly* appears to have taken a different view. That decision itself is of no authority, because it was reversed on appeal; and still less, therefore, can an *obiter dictum* of the Judge who decided that case be binding upon me; but it does certainly appear that the view taken by His Lordship was that the Charity Commissioners had no jurisdiction in contentious cases. However, not considering myself bound by that *dictum*—feeling myself free to give my own opinion as to the construction of the section—I am compelled to say it appears to me so plain and so clear, that, notwithstanding that *dictum*, I do not feel it necessary to call upon counsel to argue on the other side.

The second objection of a public character was this, that there was no jurisdiction in the Charity Commissioners to appoint additional trustees. There, again, I cannot accede to the argument. It appears to me clear that there was. It depends on two sections of the first Act—the Act of 1853, sects. 28 and 32. The former section applied where the charity had an income below a certain

(1) 34 L. J. (Ch.) 169.

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pecuniary amount, and the other where it exceeded that amount. The 28th section provides in effect that where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity shall be considered desirable, then the Court of Chancery may make the proper order in Chambers instead of upon an information; and the 32nd section gives the same power in the like general terms to the County Court when the income falls below the specified sum. All these powers are by the Act of 1860 transferred to the Charity Commissioners.

It is not disputed that, even independently of the *Trustee Act*, the Court of Chancery, on information filed, has jurisdiction to appoint additional trustees of a charity, and it is not disputed that there was also statutory jurisdiction in express terms, and for this purpose, conferred upon the Court of Chancery by the *Trustee Act*, 1850, sect. 32. That being so, the jurisdiction of the Court of Chancery is clear, and consequently it appears to me the jurisdiction of the Charity Commissioners is equally clear.

Then it is said—and this is the third objection on general grounds—that, even assuming the Court had jurisdiction, it could not exercise the jurisdiction in the case of the trustees of a Church of *England* school, when the effect of the exercise might be that the new trustees, either alone or in combination with one of the existing trustees, might take advantage of or use the powers given to them by the *Elementary Education Act*, by which the school could be handed over to a school board. All I can say is that that is no restriction on the exercise of the jurisdiction. It might or might not make the Court very careful in exercising it; but the mere fact that the Legislature has decided that a certain majority of the trustees, two-thirds in number, may, in effect, to a certain extent change the objects of the charity by allowing scholars not professing the religious opinions of the Church of *England* to attend a church school, or what was formerly a church school, is not a reason why additional trustees should not be appointed. As I said before, if there is such a thing in contemplation, the only effect, it appears to me, it should have, would be to make the Court appointing very careful in its selection, and very careful in inquiring whether it is necessary that there should be additional trustees.

The only other objection of what I may call a public character

is this: It was said, At all events you cannot exercise this power as regards a church school, because the 46th section of the Act of 1853 contains restrictions which prevent your appointing trustees who might use the powers of the *Elementary Education Act* to the prejudice or supposed prejudice of the Church of *England*. It appears to me that that is not the true meaning of the 46th section. The 46th section is this:—[His Honour read it:—] Now I agree that that section would have prevented the Court from appointing any but Church of *England* trustees. I think it would be almost impossible to read that section, knowing what the practice of the Court of Chancery was as regards the appointment of trustees for church charities, so as to say that the Court would have been authorized to appoint any but members of the Church of *England* as trustees of this charity, which was undoubtedly and indisputably a church charity, and to that extent I should have been disposed to say, that if any one of the trustees had not been a member of the Church of *England*, there would have been a fatal objection to the appointment. However, it appears they are all members of that church, and it does not appear to me that there is any other right or privilege affecting this case reserved to the Church of *England* by this section except that which I have mentioned.

This being so, it appears to me that all the public objections—all the objections which could be of any possible validity so far as this case is concerned, as governing other cases—are clear, and do not cause, in my mind at all events, any feeling of doubt or hesitation.

I now come to what I will call the private objections, which certainly are of a somewhat different character, not quite so easy to deal with, but which, as it appears to me, can be disposed of without my expressing any very decided opinion on any one of them.

It is said that, assuming there is jurisdiction, still the Charity Commissioners have not exercised a wise discretion in exercising it at all—that is one objection; or, secondly, in exercising it by the selection of the particular three persons they have selected. Now the first observation I have to make on that is, that this is an appeal, and a statutory appeal. What the difference may be between a statutory appeal and a re-hearing it is not necessary to define, but undoubtedly there is some, and not an immaterial difference, as to the mode in which the Court deals with the decision

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appealed from, that difference not being to the advantage of the appellant in a statutory appeal. The second consideration is this, that it has been laid down as a general rule by Courts of Appeal that in no case where a decision depends on the personal discretion of a Judge should an appeal be allowed at all. That is the general rule, but it is not, as the law now stands, without exception; for I think there may be a case of miscarriage so palpable and so gross that even in a statutory appeal the Appellate Court would be justified in reversing the order, on account of the mistake or miscarriage of the Court below, even as to the exercise of discretion. But I think there must be an exceedingly strong case made out in order to induce the Court of Appeal so to interfere, and I do not think there is any such case made out upon the present occasion.

Now the first objection is that the Charity Commissioners should not have appointed any additional trustees. The facts are these: There are two clergymen, the Rev. Dr. *Bates* and the Rev. Mr. *Hayter*. They are the joint rectors of a parish. In this parish there is a church school, which was founded a great many years ago, and to the foundation of which Dr. *Bates* contributed in the most efficient manner, both by his personal exertions and the expenditure of his money. He therefore considered himself, and, in my opinion, had a right to consider himself, to some extent as one of the founders of the school. This school, however, had been for between sixteen and seventeen years managed, controlled, and maintained—that is, in the sense of obtaining subscriptions and incurring pecuniary liabilities—by the other rector, the Rev. Mr. *Hayter*, and on the whole he seems to have managed it very well. He appears to have appointed the masters, although, of course, nominally the assent of Dr. *Bates* was required. In August, 1871, the master of the boys' school left. At that time there was no school board in the parish, although there was, no doubt, some intention on the part of some of the inhabitants of electing one. For some reason or other, which I prefer not to inquire into, the two rectors cannot agree in nominating a new schoolmaster. Dr. *Bates* does not think fit to entrust Mr. *Hayter* with that office which he had so well performed for sixteen years—the management of the school—and rather than concur with him, or rather than let him appoint alone the schoolmaster, he preferred that

the poor children of the parish should go without education. Mr. *Hayter*, on the other hand, rather than agree to appoint a clergyman who seems to have been duly qualified, and who was proposed by Dr. *Bates*, also determined that it was better that the school should be shut up; and between the two these unfortunate children were left entirely deprived of education for two or three years.

Now I must say this was a lamentable state of things. It is not for me to say which of these two clergymen was primarily or which was secondarily censurable. I think it must be obvious to every one that they were both in some degree censurable. Either party, by abating his extreme pretensions, could have allowed the school to remain open, and these poor children to receive the inestimable blessing of a good and sound education. However, both parties preferred to stand on their extreme rights, and the result was that the whole of this charity, so far as the boys were concerned, came to nothing. The children were uneducated, and then application is made to the Charity Commissioners for additional trustees.

What could the Charity Commissioners do? It is at least very doubtful whether they could have removed these clergymen, being *ex officio* trustees of the charity. The only course open to them was to appoint at least three who should outvote these two, and who would appoint a schoolmaster if necessary, or do any other act which might be required for educating the poor children of the parish. Therefore, so far as regards the expediency of exercising their discretionary powers of appointing additional trustees, I have no doubt that they well exercised their discretion.

The next point is this: Were the three gentlemen whom they did appoint so entirely objectionable, so grossly and clearly unfit, that I should be justified in saying the order appointing them should be discharged? Now I will consider who they were and how they came to be appointed. It seems that there was in November of the same year a school board elected. In consequence, as some say, of the quarrels in the parish between the clergymen, and in consequence, as others say, of the conduct of one or both of the clergymen, the witnesses assert that it was impossible, in their opinion, to get up sufficient subscriptions to continue the school on its old footing, and they state, being gentle-

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men of position and respectability, that in their opinion the best thing to be done was to transfer the school to the school board. Mr. *Hayter* was of the same opinion. Dr. *Bates* had—and I do not say either unnaturally or improperly—very strong conscientious objections to such a proceeding, because it deprived the school of that special or denominational character, as regards religious teaching, which he, in common with many others, thinks absolutely essential to a sound education.

That being the state of matters, the chief landowners in the parish send a memorial to the Charity Commissioners, and ask them to appoint additional trustees. Dr. *Bates*, with the assistance of his brother, opposed the appointment. The Charity Commissioners were fully informed of what was going on. They were told that one party desired that the school should be transferred to, or be placed under, the management of the school board, and the other party opposed it. They knew that Mr. *Blyth*, one of the three persons proposed, was the chairman of the school board. As regards the others, the first was Mr. *Overman*, to whom I do not find that any specific objection was made—in fact none is alleged now, except the belief of Dr. *Bates*, which appears to be ill-founded; for it is positively denied on oath by Mr. *Overman* that he was in any way pledged to the transfer, or was even inclined to the transfer.

The other proposed trustee was a clergyman of the Church of *England*, but it was objected that he was a nephew of Mr. *Blyth*, and would do whatever Mr. *Blyth* wished. The Charity Commissioners said to Mr. *Bates*, who was acting for his brother: "We are going to nominate Mr. *Blyth*, who is a partisan on one side; we think of nominating Mr. *Overman*, who is not a partisan at all; will you nominate a partisan on your side, so that we will nominate a partisan on each side and an indifferent person?" Mr. *Bates* accepts the offer, and nominates Mr. *Mitchell*, and the Charity Commissioners appoint Mr. *Mitchell*. That is, they take Mr. *Blyth*, who wishes for the transfer; Mr. *Mitchell*, who is the nominee of the rector, Dr. *Bates*, who opposes the transfer; and Mr. *Overman*, who is simply a memorialist, who has taken no part in the matter, and says he will not pledge himself either way.

Surely this is not such a gross and improper appointment that

this Court can set it aside. How does it, then, happen that Dr. *Bates* objects to the nomination of Mr. *Mitchell*, that he had made himself? Because Mr. *Mitchell*, under the circumstances, as he states in his affidavit, however strongly he felt regarding the preference to be given to denominational education, felt still more strongly the necessity of some education for the poor children, and therefore voted against Dr. *Bates* on the question of transfer, which has induced Dr. *Bates* to believe, contrary to the fact, that Mr. *Mitchell* had been all through an enemy in disguise, and that he was throughout pledged to the transfer, and had obtained the nomination of Mr. *Bates*, acting for Dr. *Bates*, under false pretences. All this, as I said before, is utterly denied, and on the evidence before me it appears to me clear that the Charity Commissioners wished to act most fairly and impartially in the matter. Neither Mr. *Blyth* nor Mr. *Mitchell* were, in one sense, pledged; they had not done more than express an opinion. Mr. *Blyth* was well known to be in favour of the transfer; Mr. *Mitchell*, as far as the Charity Commissioners were concerned, was equally well known to be opposed to the transfer. As I said before, Mr. *Overman* was impartial. As regards the rectors, they were one and one, and consequently the Charity Commissioners, in appointing three additional trustees, got a board of five, two of whom were apparently of one opinion, two of another, and the fifth neutral; and the board so constituted has, under the special circumstances stated in the affidavits, decided that the best thing to be done is that the school shall be transferred to the school board.

Now I must say, without pledging myself to this, that I should have appointed all three of these gentlemen (which I do not think it at all necessary for me to say or consider in any way)—that I am clearly of opinion that there has been no such gross miscarriage, no such utter want of exercise of discretion, as ought to induce a Court of Appeal to interfere in the matter. Under those circumstances, considering that all the objections have failed, I must dismiss this Petition, and of course the costs must follow the result.

Solicitors: Messrs. *Warry, Robins, & Burges;* Messrs. *Raven & Bradley.*

M. R.

1873

Dec. 19, 20.

COLLIER *v.* WALTERS.

[1873 C. 43.]

Will—Construction—Estate of Trustees—Contingent Remainder—Res judicata.

25 Ch D 234

A testator, by will dated in 1827, devised his estate to trustees and their heirs upon trust that they and their heirs should stand seised of the same during the life of *W. C.*, and also until the whole of the testator's debts and the legacies thereinafter mentioned were paid, upon trust to set and let the same and apply the rents and yearly profits, and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts until they were paid; then upon further trust to apply the rents and yearly profits from time to time until three legacies were paid, and from thenceforth to pay the rents and yearly profits to *W. C.* and his assigns during his life. And from and immediately after the decease of *W. C.* and the payment of the debts and legacies and all expenses incurred by the trustees, the testator devised the estate to the heirs of the body of *W. C.*, and for default of such issue, to his own right heirs. In 1830 the trustees, by deed reciting that the debts and legacies were paid, conveyed the estate to *W. C.* for his life. *W. C.* shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to *W.* *W. C.* and *W.* afterwards filed a bill against the heir of the surviving trustee and against the eldest son of *W. C.* praying for a declaration that *W. C.* took an equitable estate tail under the will, and for a conveyance of the legal fee to *W.* The son put in an answer submitting that *W. C.* took only an equitable life estate, and that the conveyance by the trustee in 1830 was a breach of trust, and asking for a declaration to that effect. A decree was made without any declaration, directing the heir of the trustee to convey his estate under the will to *W.*, subject to *W. C.*'s equity of redemption, and was inrolled. After the death of *W. C.* his eldest son filed his bill against *W.* to recover the estate, on the ground that the limitation to the heirs of the body of *W. C.* was a contingent remainder, and that the trustees had committed a breach of trust in conveying so as to enable *W. C.* to destroy it by the recovery. *W.* by answer insisted on the inrolled decree as an adjudication on the question:—

Held, that the trustees took a legal fee under the will; that the rule in *Shelley's Case*, therefore, applied, and that *W. C.* acquired a good equitable fee by the recovery.

A general devise to trustees and their heirs under a will, the purposes of which require them to have some legal estate of freehold, *primâ facie* gives the fee, and it lies on the parties alleging that they take a less estate to shew what less estate will serve the purpose:

Held, also, that the trust to set and let, which could not be confined to an authority to let from year to year, and the direction as to the timber, were grounds for not cutting down this estate:

Held, further, that assuming the trustees not to have taken the fee, the

estate for the life of *W. C.*, which in that view of the case was in 1830 their only estate, was held in trust for *W. C.* only, and not upon any implied trust to preserve contingent remainders; and that they were justified in conveying to *W. C.*, though their doing so enabled him to destroy the contingent remainders:

Held, further, that as the Plaintiff had not asked to be dismissed from the suit instituted by *W.* and *W. C.*, but had raised the question of construction in that suit, he was bound by the decree, the direction in which to the trustee to convey his estate was a decision that he had an estate, and that the trustees had taken the fee under the will.

THIS was a suit to recover an estate on the ground that a contingent remainder to which the Plaintiff alleged himself to have been entitled had been destroyed by means of a breach of trust.

James Collier, by will dated the 23rd of May, 1827, after directing his funeral expenses and the expenses of proving his will to be paid out of his personal estate, proceeded as follows:—

"I give and devise all that my freehold messuage, &c., together with all my farming stock and all other the residue of my personal estate and effects whatsoever and wheresoever, unto my brother *Joseph Collier* and my sister *Hannah Collier*, their heirs and assigns, and to the survivor of them and his or her heirs, upon the several trusts, and to and for the several uses, ends, intents, and purposes hereinafter named and expressed of and concerning the same, that is to say, as to [here followed trusts to apply the personalty as far as it would go in payment of debts], and as to, for, and concerning all my above-mentioned real estate, upon trust that they, the said *Joseph Collier* and *Hannah Collier*, and their heirs and the survivor of them, and his or her heirs, shall stand seised of the same for and during the natural life of my brother *William Collier*, and also until the whole of my just debts and all interest due or to grow due thereon, together with the following legacies, be fully paid off and discharged, to, for, and upon the several uses, trusts, ends, intents, and purposes hereinafter named, that is to say, upon trust to set and let the same, and to pay and apply the rents, issues, and yearly profits thereof, and the value of whatever timber may be considered at its best growth, from time to time in further discharge of my said just debts, and of all interest due or to grow due thereon until the same shall be fully paid off and satisfied, and then upon further trust to pay and apply the rents, issues, and yearly

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profits thereof, from time to time, in discharge of and until the whole of the three following legacies which I hereby bequeath be fully paid and discharged, that is to say [here followed a gift of three legacies of £50], and from thenceforth upon further trust to pay over, from time to time, the rents, issues, and yearly profits of the said premises unto my said brother *William Collier* or his assigns for his use and benefit for and during the term of his natural life, and from and immediately after the decease of my said brother *William Collier*, and the payment of all my just debts as aforesaid, and also the legacies above mentioned, together with all expenses which my said trustees or any or either of them may be at or put unto in the execution of this my will, I do hereby give and devise my said real estate unto the heirs of the body of my said brother *William Collier*, lawfully to be begotten, and for default of such issue then I give and devise the same unto the right heirs of me, the said *James Collier*, for ever."

The testator died soon after the date of his will. By indentures of lease and release, dated the 4th and 5th of June, 1830, reciting that the debts and legacies had been paid, and that *William Collier* had requested the trustees to convey the estate to him for the term of his natural life, which they had agreed to do, the trustees conveyed the estate to him and his assigns for his life. On the 24th of June, 1830, *William Collier*, being advised that he was equitable tenant in tail, conveyed the estate to a tenant to the *præcipe* and shortly afterwards suffered a common recovery. He was not the testator's heir-at-law.

In 1835 *William Collier* mortgaged the estate in fee for £500, and in 1840 this mortgage was transferred to the present Defendant *Walters*, who at the same time advanced *William Collier* a further sum of £500.

In July, 1861, *Walters* and *William Collier* filed their bill against *Joseph Collier*, the heir at law of the surviving trustee, and against the present Plaintiff, who was the eldest son of *William Collier*, setting forth the above facts, and praying that it might be declared that, according to the true construction of the will, *William Collier* became, on the testator's death, equitable tenant in tail, subject to the payment of the debts and legacies, and that it might be declared that *Joseph Collier* was a trustee for *Walters*

and his heirs, subject to such equity of redemption as was subsisting under the mortgage, and that *Joseph Collier* might be decreed to convey his estate in the property to *Walters*, his heirs and assigns, subject to such equity of redemption as was subsisting under the mortgage securities.

The present Plaintiff put in a voluntary answer in that suit, and submitted that he was tenant in tail in remainder expectant on the decease of *William Collier*, that the estate of *William Collier* under the will was an equitable life estate only, and that the execution by the trustees of the deeds of the 4th and 5th of June, 1830, was a breach of trust, and he asked that a declaration to that effect might be made in the decree (if any) to be pronounced in that suit.

A decree was made on the 3rd of June, 1862, in that suit. It contained no declaration, but ordered *Joseph Collier* to convey all the estate and interest vested in him under the will to *Walters*, his heirs and assigns, subject to such equity of redemption as was subsisting in *William Collier*, his heirs, executors, administrators, and assigns, under the mortgage and further charge, and it was ordered that the Plaintiff should pay the Defendants their costs of the suit, the costs of *Joseph Collier* as between solicitor and client. This decree was inrolled.

Joseph Collier, on the 26th of August, 1862, conveyed all his estate and interest in the premises, as heir-at-law of the surviving trustee, to *Walters*, his heirs and assigns, subject to such equity of redemption as mentioned in the decree.

In October, 1862, *W. Collier* contracted to sell the property to *McBean*. The purchaser objecting to the title, *W. Collier* filed his bill for specific performance, which was dismissed with costs by the then Master of the Rolls, Sir *J. Romilly*, who held that under the will the trustees took a fee simple, which, when the debts and legacies were paid, was reduced to an estate for the life of *William Collier*; that the rule in *Shelley's Case* did not apply, and that the title, therefore, was bad (1). On appeal the Lords Justices affirmed the decree, on the ground that the title was not such as ought, after the decision of the Master of the Rolls, to be forced on the purchaser, the Lord Justice *Knight Bruce*, however, intimating an inclination of opinion that the title was good (2).

(1) 34 Beav. 426. (2) Law Rep. 1 Ch. 81.

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William Collier died in 1871, and the Plaintiff filed his bill against *Walters*, the mortgagee, who had for some years been in possession of the property. The bill alleged that, according to the true construction of the will, *W. Collier* was only equitable tenant for life; that the limitation to the heirs of the body of *W. Collier* was a legal contingent remainder; that such remainder was intended by the testator to be supported by the legal estate vested in the trustees; and that their joining in the indenture of the 5th of June, 1830, and thereby enabling *W. Collier* to destroy the contingent remainder, was a breach of trust, of which the mortgagees, when they took their securities, had notice; and that *Walters* might be declared a trustee of the property for the Plaintiff. The bill prayed for declarations to the above effect, and for a conveyance by *Walters* to the Plaintiff; for an account of rents and profits; and that *Walters* might be ordered to pay the costs of the suit.

The Defendant, by his answer, insisted that, on the true construction of the will, the trustees took the legal fee; that if they had only an estate *pur autre vie*, they held it in trust for *W. Collier* only, and were justified in conveying it to him; and that the decree in *Walters* v. *Collier* was an adjudication on the point in dispute, and precluded the Plaintiff from reopening it.

When the case was first opened, the Master of the Rolls doubted whether, having regard to the decisions in *Collier* v. *McBean*, he could do otherwise than follow the decision of Lord *Romilly* in that case; and the case was, at His Honour's request, mentioned to the Lords Justices, who were of opinion that it was open to him to hear and adjudicate on the case unfettered by the judgments delivered in *Collier* v. *McBean*.

Mr. *Southgate*, Q.C., and Mr. *Badnall*, for the Plaintiff:—

The Master of the Rolls held that the trustees took a determinable fee. There is some authority for that; but we rather contend that they took an estate *pur autre vie* with a chattel interest superadded. If that be so, *W. Collier* was not equitable tenant in tail, but only equitable tenant for life with a contingent remainder to the heirs male of his body. The rule is that the Courts will, if possible, construe a general devise to trustees so as

to vest in them only such a legal estate as is required for the duties they have to perform: *Jones* v. *Lord Say and Seal* (1); *Carter* v. *Barnadiston* (2); *Doe* v. *Cafe* (3); *Adams* v. *Adams* (4); *Doe* v. *Ewart* (5); *Waud* v. *Burbury* (6).

[The MASTER OF THE ROLLS:—That case seems to stand alone.]

Heardson v. *Williamson* (7). A power of granting leases is not, according to the later cases, sufficient to give them a fee. *Ackland* v. *Lutley* (8) and *Ackland* v. *Pring* (9), on the same will, shew that *Doe* v. *Willan* (10) does not establish that it is.

[The MASTER OF THE ROLLS:—The Court distinguished the case from *Doe* v. *Willan* on the ground that the trustees were only directed to pay a small ascertained amount of debts. That was the *ratio decidendi;* and, whether sound or not, it does not exist here.]

Mr. *Jarman* deduces from the cases that an authority to grant leases is not a sufficient ground for holding trustees to take a fee.

[The MASTER OF THE ROLLS:—I rather understand him to be of opinion that where the estate is devised to the trustees upon trust to lease, and they must at least have a life estate, there they take a fee.]

Doe v. *Cafe* is not consistent with that view. *Doe* v. *Simpson* (11) is an instance of the precise construction for which we contend being adopted.

[The MASTER OF THE ROLLS:—There the limitation was to the trustees, their executors and administrators, which would not give them a fee unless it could be affirmatively made out from the rest of the will that they were intended to have it.]

The testator has said how long the trustees are to hold the estate, and the Court will not carry their legal interest beyond that period. The direction to "set and let" is not a direction to grant leases; it means only to let from year to year.

(1) 8 Vin. Abr. 262, pl. 19.
(2) 1 P. Wms. 505.
(3) 7 Ex. 675.
(4) 6 Q. B. 860.
(5) 7 A. & E. 636.
(6) 18 Beav. 190.
(7) 1 Keen, 33.
(8) 9 A. & E. 879.
(9) 2 Man. & Gr. 937.
(10) 2 B. & A. 84.
(11) 5 East, 162.

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[The MASTER OF THE ROLLS:—I can see no legal difference between "set and let" and the word "demise" which was used in *Doe* v. *Walbank* (1). Then, too, the testator speaks of their cutting timber, which a tenant *pur autre vie* has no right to do. He does not purport to give them a power to do it, but appears to assume that they have an estate which will enable them to do it. Have they not also a power to sell: *Gibson* v. *Lord Montfort* (2)?]

We submit that the trust is only to raise money by the rents *de anno in annum*: *Wilson* v. *Halliley* (3).

[The MASTER OF THE ROLLS:—I think that is so.]

Assuming, then, that the trustees in 1830 had not the fee, but only an estate *pur autre vie*, we say they were guilty of a breach of trust in conveying it.

[The MASTER OF THE ROLLS:—How do you shew that they were trustees for you?]

They must, we submit, be considered as trustees for supporting the dispositions of the will, and had no right to take any step which could help their being defeated: *Barnard* v. *Large* (4); *Roake* v. *Kidd* (5); *Moody* v. *Walters* (6).

[Mr. *Fry*, Q.C., referred to the observation of *Parke*, B., in *Barker* v. *Greenwood* (7).]

The trustees ought not to have conveyed so as to enable the limitations of the will to be defeated; it was their duty to keep the estate: *Buttanshaw* v. *Martin* (8). Our rights, therefore, cannot be affected by their act. Then, as to the decree in *Walters* v. *Collier*, it appears that the Vice-Chancellor expressly declined to decide the construction of the will, and said it would be premature to do so.

[The MASTER OF THE ROLLS:—If I had before me his written judgment to that effect I could not vary an inrolled decree according to it. The decree made in your presence directs the trustees to convey their estate, not "their estate, if any," which is a

(1) 2 B. & Ad. 554.
(2) 1 Ves. Sen. 485, 491.
(3) 1 Russ. & My. 590.
(4) 1 Bro. C. C. 534.
(5) 5 Ves. 647.
(6) 16 Ves. 283, 295.
(7) 4 M. & W. 421, 431.
(8) Joh. 89. 5 Jur. N.S. 647

decision that they had something to convey; whereas, according to your construction of the will, they had nothing.]

The decree cannot bind the present Plaintiff, for he was not heir at the time; he had nothing but a possibility.

[The MASTER OF THE ROLLS:—He should have asked to be dismissed. He was not a proper party to the suit, for he had nothing to do with the trust, and could not be properly made a party for the purpose of trying what quantity of estate the trustees had; but as he raised the question, and the decree was made in his presence, he is bound.]

[*Doe* v. *Davies* (1) and *Poad* v. *Watson* (2) were referred to during the argument on the question as to the general principle applicable to the determining the quantity of estate taken by trustees.]

Mr. *Fry*, Q.C., and Mr. *Cadman Jones*, for the Defendant, were not called upon.

SIR G. JESSEL, M.R.:—

I have seldom seen a case come before the Court under more singular circumstances than this.

There are three questions in the cause, which I will deal with separately. The first question is whether under the will of a testator, named *James Collier*, who died in 1827, the trustees of the will took a legal estate in fee or took a life estate with a chattel interest. If they took a legal estate in fee, *William Collier*, the father, became tenant in tail; if they took an estate for life with a chattel interest, he was then tenant for life with a legal contingent remainder to the heirs of his body.

The history of the case after that is very short. In 1830, by deed the trustees conveyed to *William Collier*, senior, the life estate which they certainly had at law if they had no more, and thereupon (the usual form was gone through) in 1830, *William Collier* suffered a recovery, which, if he had an estate tail, would have barred it. If he had not an estate tail, he would have certainly destroyed the contingent remainder at law, and prevented, there-

(1) 1 Q. B. 430. (2) 6 E. & B. 606.

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fore, the heir of his body ever recovering the estate, at all events at law. Then by an indenture, which for this purpose I will call a mortgage, made in 1835, *William Collier*, the father, mortgaged the property to certain persons. That mortgage was transferred, and a further sum lent, and by a deed of the 29th of May, 1840, it became vested in the present Defendant, *Walters*. The question is whether *William Collier*, the present Plaintiff, who is the eldest son and heir of the body of *William Collier*, the father, has any title, or whether the title of *William Walters*, the mortgagee, is not a good title. That is the question which I now have to decide.

Now, as I said before, the case comes before me under very singular circumstances, and I will state why. A good many years ago, *William Collier*, the father, attempted to sell the estate. The purchaser objected to the title, and a suit of *Collier* v. *McBean* was instituted, which came on to be heard before my predecessor, Lord *Romilly*, and is reported (1). Upon the hearing of that suit, which was for specific performance, his Lordship determined two things; first of all, that the purchaser was not to take the title, because it was bad, and secondly, that according to the true construction of the will, the estate taken by the trustees was what I may call a determinable fee. His Lordship says (2), "I am of opinion that, though the estate taken by the trustees was a fee simple estate, still that it was one determinable on payment of the debts and legacies, and the decease of *William Collier*." So that he decided that the title was bad, because they took a determinable fee. The case went up on appeal, and is reported (3). The Lords Justices decided that they could not force the title on the purchaser, although one Lord Justice was of opinion that the title was good, and the other does not seem to have dissented. That class of decisions has been since overruled by a decision of the Court of Appeal in *Alexander* v. *Mills* (4), and I think that I am entitled to say that the decision in *Collier* v. *McBean* in the Appeal Court was not according to the law as it now stands. In that state of the authorities I felt a difficulty (though I thought the decision altogether erroneous) in overruling a decision come to upon a solemn occasion by my predecessor, and I declined to do

(1) 34 Beav. 426. (3) Law Rep. 1 Ch. 81.
(2) Ibid. 430. (4) Ibid. 6 Ch. 124.

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it. The case was therefore, at my request, taken before the present Court of Appeal, and they gave me leave to consider the case as if I were not bound by the decision of Lord *Romilly*, or the opinion expressed by Lord Justice *Knight Bruce* on appeal; therefore I was free to consider it as if there were no authority on the question. Then another singular point arose. When the case was first mentioned to me, the counsel for the Plaintiff naturally asserted that I was bound by the decision of Lord *Romilly*, and I thought I was, until I was freed from it; but when the case comes to be argued on the footing that I was not to be bound by that decision, neither counsel asserts that that decision is right, but both positively abandon it: both the leading counsel and the junior counsel, on consideration, say that they cannot support the decision of the Master of the Rolls. That is a very strong and a very peculiar circumstance. His Lordship having determined that according to the true construction of the will there was a determinable fee, neither of the counsel for the Plaintiff will argue in support of that proposition at all. In fact there is not any authority to be found for any such determinable fee. I have looked at an enormous number of cases to see if I could find such an authority, but I have been quite as unsuccessful as the counsel for the Plaintiff, and I think there is no such case to be found. I think, therefore, I may dismiss the interpretation of the will given by Lord *Romilly* as untenable.

The next question is, what is the proper interpretation of the will? and I agree that the testator has done his best to puzzle the lawyers. I am bound to interpret the will, and to interpret it according to rules which, as I think, are well established; and the only question is, how far those rules apply to the present case. Now, the first observation to be made upon the will is this, that there is a gift to trustees and their heirs, and that the trustees and their heirs are to stand seised (they get legal seisin of something, and it was not denied that they must get an estate of freehold of some kind or other) "for and during the term of the natural life of my brother *William*, and also until the whole of my just debts and all interest due thereon has been paid." Now, the rule is this, that trustees under a devise to them and their heirs *primâ facie* take a fee. I would rather put the rule in the language in which

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it has been put in two cases. It is very important that these rules should be observed, for they are rules of real property law, and are not to be set aside at the mere caprice of a judge, but they must govern him in interpreting these wills, and it is necessary to see what the rules are. They have properly been called subordinate rules, because the primary rule is to ascertain the meaning of the expressions in the will from the will itself; but in so ascertaining it, these subordinate rules become of importance. In the case of *Doe* v. *Davies* (1), Mr. Justice *Patteson* lays down the rule in this way: "If the devise be for purposes which are to last only for a certain time, the use of the word 'heirs' will not give a fee, the devise will be cut down to the time necessary for the purposes"—that is a certain time—"But if a fee be given in terms with trusts which by their nature extend over an indefinite time, it is not so"—here we have trusts for the payment of debts which of course by their nature extend over an indefinite time—"if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down." That is the rule. Then Mr. Justice *Williams* gives the rule almost in the same terms. He says, "The estate being given to the trustees for particular purposes, it cannot be deemed immaterial what terms are used in giving it. If the words are such as pass a fee, it lies upon those who contend for a less estate to cut down their import. It is true, according to the cases which have been cited, that the word 'heirs' is not decisive, if the purpose of the devise clearly cuts down the estate."

Now this kind of case was again considered in *Poad* v. *Watson* (2); and there Mr. Justice *Coleridge* puts the rule in this way: "The paramount rule is, to look to the intention as appearing on the whole will. But there are secondary rules, one of which is that the words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shews that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shewn it remains an estate in fee." Then Mr. Justice *Erle* says: "There are words clearly meaning that the testator gave the trustees a fee simple; but, if a less estate would certainly enable the trustees to fulfil all the trusts, the fee simple

(1) 1 Q. B. 430, 438. (2) 6 E. & B. 606, 617.

would be cut down to that estate. I examine this will, and I find several trusts which may go beyond the life of *Elizabeth*, and consequently no certain estate less than a fee simple will do." That rule is, therefore, a rule which, I think, is clearly and fairly settled by authority, and should govern me in construing this will. Now, there is another rule, which may be collected from all the authorities, that you cannot cut down the estate in fee simple unless you can point out on the face of the will what less estate the trustees take. Upon that there is immense difficulty here. So great is the difficulty that Mr. *Southgate*, who opened the case, first of all proposed one estate, then he proposed another, and Mr. *Badnall*, who followed him to-day, if I may say so, in a very able argument, has proposed a third. The first proposal of Mr. *Southgate* was, that the trustees took an estate for the life of *William Collier*, with a chattel interest superadded until the debts, &c., were paid. His second proposition was, not that they took a life estate with a chattel interest superadded, but that they took a concurrent chattel interest and life estate (that is, they took the two estates concurrently for, I suppose, whichever should last longest, but they were both concurrent), and that the second estate would last until the debts were paid. I will examine Mr. *Badnall's* proposition after I have disposed of these two. The first, that they took an estate for life, with a chattel interest superadded, clearly will not do. I pointed that out to Mr. *Southgate* in argument, and he abandoned it. The trust to pay debts is the first trust, and the tenant for life is to take nothing until the debts and legacies are paid. If you are to imply a chattel interest, therefore, from a gift to the trustees upon trust to pay debts and legacies, that chattel interest will be implied from the moment of the testator's death; and it is impossible, therefore, to hold that they took during the life of *William Collier*, and then took a superadded estate by implication upon trust to pay debts and legacies. I need say no more about that. Then, as regards the concurrent chattel interest and life estate, did anybody ever hear of such a thing as taking a chattel interest and a freehold estate together? It is a novel idea, and whether they can subsist together, or whether the doctrine of merger or extinguishment would apply, I do not say. The notion that they should take a chattel interest

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and a freehold interest at the same moment, both to subsist together, appears to me to be self-contradictory; and in the absence of any authority I decline to recognise the possibility of implying any such estate.

Now, then, these two being rejected, Mr. *Badnall* to-day suggested a third, that they took a freehold interest for the life of the tenant for life, and, if necessary, a further chattel interest until the debts were paid. That is a possible interest, and, in fact, *Doe* v. *Cafe* (1) shews such an interest. There, it was an estate *pur autre vie* for the life of the lady, and then chattel interest until the infants should attain twenty-one. That is quite a possible interest, but I cannot find it here. That would be an estate during the life of the tenant for life, and then, if at his death the debts were not paid, until they were paid. I agree, if those were the words, Mr. *Badnall's* suggestion would be admissible, but they are not the words. That would give a new estate arising after the cesser or determination of the estate for life in case the debts were not paid by perception of rents and profits during the life of the tenant for life. The words are, in the first place, "to pay the rents and profits," and then to pay the surplus to the tenant for life, shewing that instead of raising a new contingent estate the testator thought that *William Collier* would live long enough to allow the rents and profits to pay off the whole of the debts and legacies during his life, therefore I cannot see on this will that I am at liberty to imply the estate suggested by Mr. *Badnall.* That being so, it is reduced to this, that nobody can suggest any less estate.

These four suggestions, the terminable fee of Lord *Romilly,* the two suggestions of Mr. *Southgate,* and that of Mr. *Badnall,* being all out of the way, I think I am liberty to say that human ingenuity cannot suggest a fifth. Therefore we are actually reduced to this. The first rule being, that those who say they do not take a fee shall point out what estate they take, they cannot suggest any estate which, in my opinion, can be fairly and properly implied from the words used in this will. But further, not only can I find nothing to cut down the estate in fee beyond the words, "shall stand seised for the natural life and also until" (those words were very much and very properly relied upon) but I find

(1) 6 Ex. 675.

a great deal the other way. The first is, that there is a trust to let and set the same, that is, the property. Now it was argued, that that only meant to let it from year to year. I cannot so construe the words. I construe them in their legal and proper meaning, and I cannot restrict them in that way. A trust to set and let, or a trust to lease, *primâ facie* (as was put in *Doe* v. *Willan* (1), and a number of authorities bearing upon the subject) shews that the parties who were to lease under a trust have not a bare power, but have got an estate, and consequently that the estate being of indefinite duration must be a fee in order to allow a leasehold interest to take effect out of it. In the next place, I find this, that they are to apply not only the rents and profits, but the value of whatever timber may be considered at its best growth. Now the person who penned that will could not have supposed the trustees could apply the value of the timber without their having the power to cut it. You cannot apply the value of timber in payment of debts unless you cut it, and in order to cut it you must have power to cut it. Now, if they take only an estate *pur autre vie*, or only a chattel interest, they have no power to cut it by law, but if they take a fee simple they have, and therefore, as there is an implied right (that is, to cut the timber), it appears to me to shew that these trustees in order to cut the timber must take the fee. That is another reason in support of their taking the fee on the construction of the will, and quite independent of the rule, that those who say they do not take a fee must shew a definite and certain period for which they take the estate, which cannot be done.

For these reasons, I am of opinion that these trustees take the fee, and, consequently, that *William Collier* took an equitable estate tail, which has been well barred by recovery.

The second point is one of some curiosity, on which I have heard a most ingenious argument. Supposing that that was not the true construction, and that *William Collier* took an estate for life only, and that there was a legal contingent remainder, then the trustee has conveyed the life estate to *William Collier*, and the effect of his recovery has been, according to the case of *Doe* v. *Gatacre* (2), and, in fact, according to what was considered well settled

(1) 2 B. & A. 84.

(2) 5 Bing. N. C. 609.

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law long before that case, a destruction of the contingent remainder. That so far is admitted. Then it was said, though the contingent remainder has gone at law, it remains in equity; and the argument submitted in support of that contention was this:—It was said that a trust to *A.* during the life of *B.* to pay the rents and profits to *B.*, followed after the decease of *B.* by a limitation to contingent uses which are legal uses, makes *A.* a trustee not only for *B.*, but by implication a trustee for the purpose of supporting the contingent remainder; in other words, a trustee for the persons entitled to the contingent remainder, and that being such an implied trustee to support contingent remainders, he was guilty of a breach of trust in conveying the legal estate to the tenant for life, and thus enabling him by recovery, according to the then state of the law, to destroy the contingent remainder. All I can say is, that this is a wonderful discovery to make in the year 1873. The trusts for preserving contingent remainders are very old; they were invented because without the protection of the trustees, and the express trust to preserve contingent remainders, the tenant for life, with the concurrence of the trustees where they had the legal estate, or without their concurrence when he had the legal estate, could, as the law then stood, destroy the contingent remainders. If any such doctrine of implied trust to preserve contingent remainders had ever existed or been recognised in this Court, we should have found some authority upon it, especially having regard to the ingenuity of conveyancers, which has been exercised at various stages and in various ways to prevent this destruction, and I cannot find a trace of any such authority. I am clearly of opinion, therefore, that there is no such implied trust; that there was no breach of trust, and that if the contingent remainders were destroyed at law they were destroyed in equity also.

Now there is a third ground upon which I am of opinion the Plaintiff must fail, and it is because there are so many grounds that I have not thought it necessary to call on the Defendants. The third ground is this: *W. Walters* in the year 1861 instituted a suit of *Walters* v. *Collier*, the object of which was to get from the surviving trustee of the original will the legal estate in reversion which was left in him after the legal life estate was conveyed to *William Collier* the father. The mortgagee, with *William Col-*

lier the father, were Plaintiffs, and the trustee, *Joseph Collier*, and *William Collier*, Junr. the present Plaintiff, who was then, of course, only the expectant heir of the body, were Defendants. The bill asked that the trusts of the will might be performed, that it might be declared that according to the true construction of the will the Plaintiff, *W. Collier* the father, took an estate tail, that it might be declared that the Defendant *Joseph Collier* was a trustee for *Walters*, and that there might be a direction to convey. The Defendant *William Collier* the younger in his answer set up the very claim he sets up now. He contested the title of the Plaintiff *William Collier* the elder as tenant in tail, insisting that he was only tenant for life, and he set up the exact claim made by this bill. Upon that there was a decree. Now, according to my view of the case, the Defendant *William Collier* the younger was entitled to say, "I ought to be dismissed; I am only expectant heir of the body; you have no right to make me a party at all. I have nothing to do with this suit. If you can get a decree against the trustee, that will not bind me, and ought not to bind me. The Court, if it thinks the matter very clear, may decide against the expectant heirs in their absence; it may do that if it thinks fit, but I will not be bound." He did not do so. A decree was made; and the decree made by Vice-Chancellor *Wood* in 1862 was this:—"The Court doth order that the Defendant *Joseph Collier* do convey all the estate and interest in the messuages, lands, &c. comprised in the will of *James Collier*, the testator in the cause named, vested in him under the said will to the Plaintiff *William Walters*, his heirs and assigns, subject, nevertheless, to such right or equity of redemption as may be subsisting in the said messuages, &c. in the said *William Collier*, and his heirs, executors, administrators, and assigns, under and by virtue of the indenture of the 25th of May, 1840"—that is the indenture of mortgage—"and that the Plaintiffs do pay the Defendants their costs of the suit." Now that decided two things: first of all, that *Joseph Collier* had a legal estate to convey, because the Court ordered him to convey the estate vested in him, and of course no Court would order a man to convey if he had nothing in him; and, secondly, that when the conveyance of the legal estate was made, it was first of all for the benefit of the mortgagee, and, subject to that, for the benefit of

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William Collier the elder, his heirs and assigns, that is, it decided that the equity of redemption or the ownership of the estate was then vested in *William Collier* the elder. To that suit *William Collier* the younger was a party, and he received his costs. He now says that that decree was erroneous. I think this answer is conclusive, viz. that whether it is right or wrong, he is bound by it, and if he has not appealed, or if now by its inrolment he cannot appeal, not having any case of fraud or surprise, nor even having made any attempt in this bill, although the decree is properly pleaded, to impeach it, he cannot now say that the decision of the Court in the case of *Walters* v. *Collier* was wrong, and being bound by it, he is entirely deprived of any beneficial interest in this estate.

I think upon all these grounds the Plaintiff has failed to make out his title, and that the bill must be dismissed, and, of course, with costs.

Solicitors: Mr. *Henry Tyrrell;* Messrs. *Tucker & Lake.*

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In re POOLE FIREBRICK AND BLUE CLAY COMPANY.

Company—Voluntary Winding-up—Action by Creditor—Staying Execution—Costs—Companies Act, 1862, *s.* 138.

Where, after the commencement of a voluntary winding-up, a creditor brings an action and recovers judgment against the company, the Court will, under sect. 138 of the *Companies Act*, 1862, stay execution upon the terms of the creditor being admitted to prove in the winding-up for the amount of his debt, the costs of the action at law, and the costs of the application to stay execution.

In re Keynsham Company (1), *In re Life Association of England* (2), *In re Peninsular, &c., Banking Company* (3), and *Ex parte Levick* (4), discussed.

IN March, 1873, the *Poole Firebrick and Blue Clay Company, Limited*, which had been formed in 1870 under the *Companies Acts*, 1862 and 1867, went into voluntary liquidation.

Under this liquidation Messrs. *Ingram, Stone, & Co.* claimed to

(1) 33 Beav. 123.
(2) 34 L. J. (Ch.) 64.
(3) 35 Beav. 280.
(4) Law Rep. 5 Eq. 69.

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be creditors of the company to the amount of £193 15*s.* 4*d.* for work and labour done, materials supplied, and goods sold and delivered to the company at their request. The claim was disputed by the liquidators, and in October, 1873, Messrs. *Ingram & Co.* gave notice to the liquidators that unless they took out a summons in the liquidation, under sect. 138 of the *Companies Act*, 1862, for the purpose of having an adjudication on the claim, they would bring an action to recover the amount. The liquidators failed to take out a summons, and on the 11th of November, 1873, Messrs. *Ingram & Co.* brought their action in the Court of Exchequer. The company appeared and pleaded never indebted; and notice of trial was given for the *London* sittings of that Court, which commenced on the 10th of December, 1873.

On the 8th of December, 1873, the liquidators served Messrs. *Ingram & Co.* with a notice of motion for the 11th of December, to restrain them from further prosecuting their action and to have the claim adjudicated on in the liquidation; and a motion was made accordingly on the 11th of December. Messrs. *Ingram & Co.* appeared, and objected that the matter in dispute could be better adjudicated on in the action which was in the paper for trial on that very day; and the motion was ordered to stand over for a week.

On the 12th of December the action came on for trial; the company did not appear; and Messrs. *Ingram & Co.* obtained a verdict.

Mr. *Hadley* now renewed the motion, and asked that Messrs. *Ingram & Co.* might be restrained from issuing execution, the liquidators undertaking to admit them as creditors in the winding-up for the amount of their judgment and costs at law and costs of this motion, citing *In re Life Association of England* (1); *In re Keynsham Company* (2); *In re Peninsular, &c., Banking Company* (3).

Mr. *Jason Smith*, for the creditors:—

I submit that the creditors ought to be at liberty to issue execution for the costs of the action at law.

(1) 34 L. J. (Ch.) 64. (2) 33 Beav. 123. (3) 35 Beav. 280.

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M. R. 1873 — *In re* Poole Firebrick and Blue Clay Company.

In *Ex parte Levick* (1) voluntary liquidators brought an action which failed, and the Defendants were allowed to issue execution for the costs. The same thing ought to be done here. Before action brought we offered to have the matter determined in the winding-up; but the liquidators took no steps for that purpose, and we had no power to do so. Our only course was to bring an action. The company defended that action up to the last moment, but, when the cause came on for trial, did not appear. That shews that the defence was not *bonâ fide*. A company in liquidation ought not to be allowed to defend an action so as to occasion a much greater amount of costs to the creditor than would have been incurred in the winding-up, and then throw the whole of the entire costs on the creditor who has succeeded.

[The Master of the Rolls:—What you complain of is really misconduct on the part of the liquidators, which ought to be answered by them personally; but have I any jurisdiction to compel them to make good the loss they have occasioned?]

The action was defended in the name of the company, and it is to the company that we must look. If the liquidators, by their misconduct, have caused loss, they will be answerable to the contributories in the winding-up.

Sir G. Jessel, M.R.:—

This case has been extremely well argued by Mr. *Jason Smith*, and if there were no authority on the subject I should not only call on the other side, but take time to consider what rule ought to be adopted by the Court in such cases. There are, however, three decisions of Lord *Romilly*, all of which are in point as regards principle, and in the last of these the facts are very nearly those of the present case. It is true there is a decision of Vice-Chancellor *Stuart* which seems to be at variance with the cases to which I have referred, but in it the circumstances were quite different, and I do not think it is really in opposition to the principle which has been laid down.

The first case was that of *In re Keynsham Company* (2), decided in 1863. There the creditor had begun his action before the com-

(1) Law Rep. 5 Eq. 69. (2) 33 Beav. 123.

mencement of the winding-up; the liquidators applied to the Court to stay the action, and the Master of the Rolls granted an injunction, and said that he thought the practice was analogous to the staying of actions after a decree for administration, and that the creditor ought to have his costs down to the time when he had notice of the winding-up, such costs to be added to his debt.

The next case is that of *In re Life Association of England* (1), decided in 1864. There, also, the creditor commenced his action before the commencement of the winding-up; and upon an application for an injunction the Master of the Rolls says this: "There is clearly an analogy between this and a suit for administration. If the executor does not admit assets, the costs of the creditor can only be added to his debt; but if assets are admitted, and the debt not disputed, the creditor's costs would at once be paid. In this case I can only grant the application on condition, first, that Mr. *Whitty* (the creditor) be allowed to see the proceedings on the winding-up, and, secondly, to prove for his debt, which must include the costs of the action at law as well as the costs of this motion. If the action had been commenced after notice of the resolution to wind up, I should certainly not have allowed the costs." In that case the attention of his Lordship does not appear to have been called to the difference between a liquidation by the Court and a purely voluntary liquidation, under which a creditor has no means of coming in and establishing his claim; so that perhaps it may be considered that the last part of the judgment cannot be fairly used as an authority. But then came the third case, *In re Peninsular, &c., Banking Company* (2). There, in January, 1866, after the winding-up commenced, an action was brought by a creditor on bills of exchange, and on the 16th of February the creditor would have been entitled to sign judgment. On the 15th of February a motion was made to stay proceedings. The Master of the Rolls said: "I will stay execution only, and the creditor can come in under the winding-up. He can add his costs to his debt; I cannot make him pay costs." The creditor was represented by eminent counsel, and the attention of the Master of the Rolls must have been called to the distinction between a compulsory and voluntary winding-up, and it could hardly have been disputed that the creditor had notice of

(1) 34 L. J. (Ch.) 64. (2) 35 Beav. 280.

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the winding-up; at all events the decision was that the costs were to be added to the debt.

Then the decision in *Ex parte Levick* (1) is said to be contrary to these. There the action was brought by the liquidators, after the commencement of the winding-up, and, I presume, in the name of the company. The action was unsuccessful, and the Defendants became entitled to recover their costs from the Plaintiffs; but they were not creditors except in that sense. The Vice-Chancellor *Stuart* held that the Act did not apply, inasmuch as they were not creditors at the commencement of the winding-up; if they had been creditors at that time, I presume he would have followed the decisions of the Master of the Rolls.

I think in the present case I must follow those decisions, which appear to me to have established the practice; and indeed I do not see how any other rule could be laid down in a case where the dispute is a *bonâ fide* one, and the validity of the claim is to be tested. On the one hand I do not see how the liquidators are to be blamed for resisting an action, for the Act does not bind them to submit to have the matter decided in Chambers; nor, on the other hand, is the creditor to be blamed, for he has no *locus standi* such as to enable him to have the question decided in the winding-up; and, besides, there are many questions which can be much better tried by a Court of Law than in Chambers.

I cannot allow execution to issue for this debt, for all the creditors must be paid *pari passu*. It is said I ought to allow execution to issue for the costs, but the costs are a mere appendage to the debt, and ought to be added to the debt itself. I cannot see, on principle, how any other rule is to be established. It might be better if the creditor had a right to take out a summons as well as the liquidator; but that is a matter for the Legislature to consider. All I can do is to direct that these creditors be admitted to prove for the debt, the costs of the action, and the costs of these proceedings.

Solicitors: Messrs. *Randall & Angier;* Mr. *Plunket.*

(1) Law Rep. 5 Eq. 69.

In re TAHITI COTTON COMPANY.
Ex parte SARGENT.

M. R.
1873
Dec. 6, 13.
1874
Jan. 17, 26.

Company—Pledge of Shares—Blank Transfer—Power of Pledgee—Transfer by Instrument in Writing—Custom of Company—Rectifying Register—Jurisdiction—Companies Act, 1862.

Where a person claiming shares under a legal title applies under sect. 35 of the *Companies Act*, 1862, to have the register of a company rectified, the Court has jurisdiction to decide a question of title between him and another person claiming to be entitled to the shares, but has no jurisdiction to order costs to be paid by such third party. Nor (*semble*) has the Court jurisdiction to make an order under that section where the title of the applicant is equitable only.

Where the owner of shares borrows money and deposits with the lender certificates of his shares, and also transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest.

Where the articles of association of a company permit a transfer of shares to be made by "instrument in writing," it is not necessary that the transfer should be by deed, even although the uniform practice of the company may have been to require one.

Marino's Case (1) discussed.

Upon the occasion of a loan being made by *C.* to *F.*, the chairman of the *T. Company*, *F.* deposited with *C.* shares in various companies (including some in the *T. Company*), and transfers thereof, with the date and the name of the transferee left blank. *C.* afterwards deposited the shares in the *T. Company*, and the transfers thereof, with *S.* by way of security for a debt. Subsequently *F.*, being about to pay off his loan, was informed by *C.* that he had pledged the *T.* shares, but did not insist on the share certificates and transfers being delivered up before payment was made. *S.* afterwards filled up the blanks in the transfers, and sent them to the company for registration; but the company having received notice from *F.* that he disputed the validity of the transfers, refused to register them. *S.* applied to the Court under sect. 35 of the *Companies Act*, 1862, to rectify the register by inserting the name of *S.* for that of *F.* The articles of association of the company permitted transfers to be made by instrument in writing, but the company had always required transfers to be by deed:—

Held, that the transfers, although not good as deeds, were valid instruments in writing within the meaning of the articles of association, and conferred on *S.* a good title to the shares at law as well as in equity; that *S.* was

(1) Law Rep. 2 Ch. 596.

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entitled to have his name on the register; that the Court had jurisdiction to decide the question of title between *S.* and *F.* (who had been served), but had no jurisdiction to order *F.* to pay the costs; and that the company, having chosen to side with their chairman, who was in the wrong, must pay the costs of the application.

THIS was a summons on behalf of *Thomas Sargent*, asking that the register of members of the *Tahiti Cotton and Coffee Plantation Company, Limited*, might be rectified by inserting the name of *Thomas Sargent*, as the holder of shares numbered 46 to 120 and 15,826 to 15,862 inclusive, in the place of *Joseph Fry*, chairman of the company, in whose name the shares were standing; and that the company and *Fry*, or one of them, might pay the costs of the application.

The company was registered under the *Companies Act*, 1862, with articles of association, of which the following are the material clauses:—

"7. No person shall, as against this company, be deemed or be a shareholder in respect of any share unless he or she shall have complied with all the requirements of these articles in that behalf, and shall have accepted such shares and testified such acceptance by writing under his or her hand in such form as the company may from time to time direct, and shall have delivered such acceptance duly executed by him or her to the company by leaving the same at the offices of the company, to be entered in its books and filed in the company's office."

"28. The instrument of transfer shall be presented to the company, accompanied with an acceptance in writing by the transferee of the share or shares transferred to him or her, and also with such other evidence and documents as the directors may require to prove the transferor's title, and thereupon and upon payment to the company of the transfer fee of 2*s.* 6*d.* for each transfer, it shall register the transferee as a shareholder.

"29. The company may refuse to register the transfer of any share made by a shareholder who is indebted to it either for calls or on any other account whatsoever, and the company shall have a lien upon all the shares of any such transferring shareholder for any sum of money in which he or she may be indebted to it as aforesaid."

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The present application was made as the result of certain dealings which had taken place in regard to the shares between *Sargent*, *Fry*, and one *Richard Cornish Cannon*, a share broker. The precise nature of these dealings was a matter in dispute between the parties and formed the subject of conflicting evidence, but the facts relied on by the Court in giving judgment were to the following effect:—

In May, 1870, *Fry* borrowed two sums amounting to £450 of *Cannon*, and on the occasions of such loans deposited with him by way of security the certificates of certain shares in various companies, including those now in question; and he also deposited transfers of these shares signed by him, but with the name of the transferee and the date in blank.

About the same time, or shortly afterwards, *Cannon* became indebted to *Sargent* in upwards of £500, and deposited with him by way of security the certificates of the shares in question, and the blank transfers thereof.

Between 1870 and the end of 1872 various transactions, which it is unnecessary to state in detail, took place between *Fry* and *Cannon*, and *Cannon* and *Sargent*.

In December, 1872, *Fry* was desirous of paying off the loan made to him by *Cannon*, principally with the view of recovering possession of certain shares of considerable value in another company. Accordingly, he applied to *Cannon*, who said that he was ready to deliver up all the securities held by him, with the exception of the certificates and blank transfers of the shares now in question; and as to these, that he was unable to comply with *Fry's* request, in consequence of his having pledged the documents with *Sargent*. *Fry* remonstrated with *Cannon*, but paid off the loan without requiring delivery of the certificates and transfers, in the hope, as he stated in evidence, that some arrangement would be come to. Accordingly, attempts were made by *Cannon* to effect some arrangement with *Sargent*, but without result; and *Sargent* filled up the transfers with his own name as transferee, and procured them to be stamped, and sent them to the company for registration in May, 1873.

Some delay took place in registering the transfers, of which *Fry* took advantage by attempting to induce *Sargent* not to insist on

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registration. On the 5th of June, 1873, an interview took place between *Fry*, *Cannon*, and *Sargent*, at which *Sargent* insisted on his right to register the transfers, and *Fry* thereupon stated to the effect that if *Sargent* would insist on registering them he could do so if he liked. *Fry* also, on the 10th of June, 1873, wrote to *Sargent* a letter containing a similar intimation; but notwithstanding all this he afterwards gave notice to the company that he disputed the validity of the transfers, and the company refused to register them.

The present summons was originally taken out on the 12th of September, 1873, against the company only. It was adjourned into Court, and upon its coming into the paper leave was given to amend it and serve the amended summons on *Fry*, and this was done accordingly.

Evidence was given on behalf of the company that it was the custom of the company to allow transfers of shares to be made by deed only.

Mr. *Fry*, Q.C., and Mr. *Stock*, for *Sargent*:—

We do not contend that these transfers are valid as deeds, but we say that they are evidence of a contract to transfer these shares, by virtue of which *Sargent* is equitably entitled to them; and he may therefore apply under sect. 35 of the *Companies Act*, 1862, to have the register rectified by the insertion of his name: *Ward and Henry's Case* (1); *Ward and Garfit's Case* (2).

24 B.D. 466 274.

[The MASTER OF THE ROLLS:—In *Ward and Henry's Case* the Lords Justices differed in their opinion as to the extent of the jurisdiction conferred by the 35th section of the *Companies Act*, 1862, and the question there raised has not been finally decided. Speaking for myself, I prefer the view adopted by Lord *Cairns* to that taken by the Lord Justice *Turner*. I think that I have no jurisdiction under that section to decree specific performance of a contract to transfer shares, and that is what you are now asking me to do. I think the words authorizing the Court to direct the applicant or the company to pay the costs must be taken to restrict the general expressions in the latter part of the clause, so as not to include the decision of equitable questions of

(1) Law Rep. 2 Ch. 431. (2) Law Rep. 4 Eq. 189.

title arising between the applicant and third parties, and that the applicant must shew a legal title to the shares in order to entitle himself to an order under that section.]

Then we submit that these transfers confer a good legal title on *Sargent*. The articles of association do not require transfers to be made by deed; all that they require is, that they be by instrument in writing, and be accompanied by acceptance in writing on the part of the transferee. These transfers fulfil these conditions. It must be taken that *Fry* authorized the blanks in the transfers to be filled up by *Cannon*. The blanks have been filled up with the name of *Sargent*, who for this purpose was *Cannon's* nominee; and consequently the transfers are valid instruments in writing within the meaning of the articles of association.

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, for the company:—

In order to entitle himself to an order under the 35th section, the applicant must shew that his name has been omitted without sufficient cause. Here *Fry*, the transferor, gave notice to the company that he disputed the validity of the transfer. The company have merely a ministerial duty to perform; they cannot decide the question between *Fry* and *Sargent* for themselves; and the Court ought to direct the applicant to institute a suit in order that the question may be tried between the parties who are really interested: *Ex parte Parker* (1). This would be no hardship on *Sargent*; for a person who takes a blank transfer is not entitled to put the company in such a position as to require it to decide between two contending parties, and ultimately to side with one of them.

But we further say that the transfers are not such as the company was legally bound to act upon. They are not deeds: *Hibblewhite* v. *M'Morine* (2); *Swan* v. *North British Australasian Company* (3). Although the articles of the company do not expressly require transfers to be by deed, the practice of the company has always been to require a deed; and under these circumstances the applicant cannot rely on these transfers: *Marino's Case* (4).

Mr. *Fry*, in reply, on the question whether, having regard to

(1) Law Rep. 2 Ch. 685.
(2) 6 M. & W. 200.
(3) 7 H. & N. 603.
(4) Law Rep. 2 Ch. 596.

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the practice of the company, the transfers ought not to have been by deed:—

The articles of association in this case expressly permit the transfer to be by instrument in writing; how can that be altered by custom? In *Marino's Case* (1) the articles were silent as to the mode of transfer, and you had to look to the custom to see what mode of transfer the company had sanctioned. In truth, however, that case was decided on the ground that the transferee had not accepted the transfer in writing.

The MASTER OF THE ROLLS:—Although there are some expressions in the judgment of Lord Justice *Turner* in *Marino's Case* which would seem to favour the view put forth on behalf of the company, I doubt whether they go to the full extent contended for. I do not think the Lord Justice meant to do more than express his assent to the argument of Mr. *Giffard*, who relied on the fact that the transfer had not been executed by the transferee. At all events, I think I am not bound by that case to decide that in this company transfers must necessarily be by deed. I must, therefore, hear the counsel for Mr. *Fry*.

Sir *R. Baggallay*, Q.C., and Mr. *Shebbeare*, for *Fry*:—

The Court has no jurisdiction to make such an order as is here asked for. Under the 35th section the Court can only decide as between a person claiming to be registered and the company; the Court has merely a ministerial duty to perform: *Ex parte Ward* (2), and cannot try a question between rival claimants.

[The MASTER OF THE ROLLS:—The Act empowers the Court to decide any question relating to the title of any person who is a party to the application, "whether such question arises between two or more members or alleged members, or between any members or alleged members and the company."]

Even if the Court has jurisdiction, it ought not to exercise it in a case of this nature, but should direct a bill to be filed: *Ward and Henry's Case* (3); *Reese River Silver Mining Company* v. *Smith* (4); *Simpson's Case* (5). We must admit, as regards the

(1) Law Rep. 2 Ch. 596.
(2) Ibid. 3 Ex. 180.
(3) Law Rep. 2 Ch. 431.
(4) Ibid. 4 H. L. 64.
(5) Law Rep. 9 Eq. 91.

facts, that *Fry* knew, when he paid off *Cannon*, that the latter had pledged these shares, and, consequently, that he may in Equity be answerable for all that results from his having permitted the shares to remain in the hands of the pledgee after *Cannon* had been paid; but we submit that these circumstances do not justify the making of an order such as is now sought.

SIR G. JESSEL, M.R.:—

I am of opinion that I must make the order asked for. The case is an unfortunate one, undoubtedly, for Mr. *Joseph Fry*; but the facts really are very plain indeed. Mr. *Fry* borrows what I will call for shortness' sake £450 of a Mr. *Cannon*, a share broker. He deposits with him as security the transfers of certain shares not quite filled up, that is, there was no date to them, and there was no name of the transferee; they were what are commonly called blank transfers. The deposits were made on two different occasions as a security. He hands to him also certificates of shares. I have no doubt that without express words Mr. *Cannon* was authorized, and was intended to be authorized, by Mr. *Fry*, if necessary, to fill up the blanks, and get the shares registered. The object and meaning of the whole transaction was, that if the money was not paid, Mr. *Cannon* should do this. Mr. *Cannon*, like every other mortgagee, had a right to re-borrow, and to transfer his security. He did re-borrow of a Mr. *Sargent*, and transferred the security to him. It seems that with the shares in this company there were other shares of greater value pledged. In December, 1872, (I pass over some transactions which had taken place in the interval) Mr. *Fry* was minded to redeem his shares from Mr. *Cannon*. He goes to Mr. *Cannon*, settles the amount due to him (which they agreed at £500), and says, "Now I will pay you off; give me back my shares. The result is that £500 is due to you; I will pay you the £500." Mr. *Cannon* told Mr. *Fry* that he had pledged the shares, that he was unable to get them back for the £500, and thereupon Mr. *Fry* remonstrated with him for having pledged the shares and put them in a position in which he could not disturb them. He not only paid him the £500, but £50 more to help him to get them back. He got back from him certain other shares which were of greater value; but as to the shares in

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this company, although he knew that Mr. *Cannon* had pledged them, he chose, either out of kindness to an old acquaintance, or because he could not help himself, to postpone getting them back till Mr. *Cannon* could arrange it. Mr. *Cannon* could not arrange it, and Mr. *Sargent*, who had never been paid by Mr. *Cannon*, thereupon did what I consider Mr. *Fry* might know the holder of the transfers would do if he were not paid, filled up the transfers with the name of the transferee and the date, got them stamped, and took them to the company to be registered. So far everything is very plain. When they came to the company for registration, it turned out that Mr. *Fry* was chairman of the board of directors, and in that position had a commanding influence with the company. Though he knew the facts I have stated, he chose to intervene and call upon the company not to register. He saw Mr. *Sargent*, and wrote a letter to him, using words to the effect that, if he would insist on registering the transfers, he might do so. Notwithstanding all this, without offering to pay Mr. *Sargent*, whom he must have known he was liable to pay in order to redeem the shares, he insisted upon the company not registering them. Under these circumstances, if I could make Mr. *Fry* pay the costs I would, because I think that he, knowing all this, as a man of business, ought to have gone to Mr. *Sargent* and paid him, and redeemed the shares. However, he took the other course, and thereupon the company, acting without full knowledge of the facts no doubt, but acting on Mr. *Fry's* representation that he had not given authority to have these transfers filled up, refused to register the transfers; and thereupon this summons is taken out.

Now, in the first place, there can be no question that these transfers were not valid as deeds; but then no deed is required by the articles of association of the company. As I have already said, I hold there was authority to fill up the blanks over the signature of Mr. *Fry*, and therefore they were validly signed, and I think ought to have been registered. I next come to the difficult subject of costs. If my hands were not tied by the section of the Act of Parliament, as I said before, I should have no hesitation in making Mr. *Fry* pay the costs, as Mr. *Fry* was in fault in not redeeming the shares. Mr. *Sargent* was not in fault. Mr. *Fry* chose to trust Mr. *Cannon*, or, as he said very fairly, was compelled

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to trust him, in order to get back the other valuable shares which he had pledged with him. That being so, Mr. *Sargent* does not move against Mr. *Fry*, but he moves against the company, and gives notice to Mr. *Fry*. The Act of Parliament provides that the Court may either refuse the application with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for rectification of the register, and may direct the company to pay all the costs of the application, and any damages the party aggrieved may have sustained. Upon that I adopt entirely what was said by Mr. Baron *Channell* in *Ex parte Ward* (1). He said, speaking of the decision of the Lords Justices in *Ward and Henry's Case* (2), "The true effect of the words used by the Lords Justices is, that if the applicant shews a clear right to have his name put on or taken off the register, then as the result of determining this question the Court will ministerially exercise the power of rectifying the register; but the right must first be established." That means that it must be established to the Court's satisfaction, namely, the Court to which the application is made. In this case the right is not only established to my satisfaction, but I think it has been most fairly and honestly and candidly put by the counsel for Mr. *Fry*, who say that they cannot contest the equitable right of Mr. *Sargent* (and I hold that this admission covers his legal right also) to have the shares transferred to him. Now that being so, what am I to do with the costs? I cannot make the right person pay them, for that would be Mr. *Joseph Fry*, whose interference has caused the application. I consider, under the words of that section, that I have no power to do so. I cannot make the applicant pay them, he has been right throughout. The only question I have to consider is, whether I can make the company pay them. Now of course the company has a right to say that, having had this notice from Mr. *Fry*, the directors were, as prudent people, entitled to hold their hands until the question should be judicially determined; and if that had been the answer, or if they had applied to Mr. *Fry* to indemnify them, or done anything of that sort, I do not think there could have been any pretence for asking them to pay costs. But what they did was this: they took

(1) Law Rep. 3 Ex. 184. (2) Law Rep. 2 Ch. 431.

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Mr. *Fry's* representation, and, without more, absolutely refused to register. Now the question that I really have to decide is this—Was Mr. *Sargent's* name omitted from the register without sufficient cause? Is it sufficient cause that somebody whose name is on the register gives notice to the company that the transfer is not valid, the transfer being valid in form? I cannot hold that to be sufficient cause, because it would come to this, that anybody giving notice would stop a transfer. Then is it sufficient cause if the person who gives the notice turns out to be wrong? The company took no step to ascertain who was in the right, but simply refused to register, and stood on that refusal; in fact, it sided with Mr. *Fry*, its chairman. Can I say that a company which chooses to refuse a transfer because the chairman says it is wrong, when it is right, is not to bear the costs resulting from that refusal, although it chose to act without getting an indemnity for those costs over and against Mr. *Fry?* I do not think so. Although I should have been better pleased, if I had had jurisdiction, to order Mr. *Fry* to pay the costs, still I think the company has not been neutral in this transaction. I think that it has sided with Mr. *Fry*, and that if Mr. *Fry* had not been chairman the same action that the company has taken would not have been taken. Therefore, on the whole, I think that the applicant succeeding in his application ought to have his costs, and ought to have them against the company.

Solicitors: Messrs. *Hancock, Sharp, & Hales;* Mr. *Byfield;* Mr. *W. Foster.*

In re MARQUIS OF ANGLESEY'S ESTATE. PAGET *v.* ANGLESEY.

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[1869 A. 72.]

Tenant for Life and Remainderman—Apportionment of Rent—Grant of Rent-charge—Mortgagor and Mortgagee—Assign of Tenant for Life—4 & 5 *Will.* 4, *c.* 22, *s.* 2.

A mortgagee who is not in possession is not an assign of the mortgagor within the meaning of the *Apportionment Act* (4 & 5 Will. 4, c. 22), s. 2.

M., the tenant for life of real estate, granted to *W.*, in consideration of an antecedent debt of £6000, a yearly rent-charge of £960, to be issuing out of the estate for a term of 100 years, if *M.* should so long live, with powers of entry and distress in the event of the rent-charge falling into arrear; and *M.* also demised the estate for a term of 200 years, if he should so long live, to a trustee upon trust for the better securing the rent-charge. *M.* died when the rent-charge was in arrear, but before *W.* or the trustee had entered on the estate:—

Held, that *W.* was not entitled to be paid the arrears of the rent-charge out of the apportioned part of the rents for the period which elapsed between the quarter-day last preceding *M.'s* death and the day on which he died.

PETITION.

By an indenture, dated the 7th of January, 1864, and made between *Henry* late Marquis of *Anglesey* of the first part, *William Watkins*, the Petitioner, of the second part, and *Charles Baker* of the third part, after a recital (amongst others) to the effect that the Marquis was indebted to the Petitioner in a sum of £6000 on certain securities therein referred to, and had agreed to sell to *W. Watkins*, in consideration of the said sum of £6000, and his delivering up the securities, an annuity of £960, to be secured and paid as thereinafter mentioned, it was witnessed that the Marquis granted unto the Petitioner an annuity or yearly rent-charge of £960, to be charged upon and issuing out of certain hereditaments of which the Marquis was tenant for life, and also upon and out of the reversions and remainders, yearly and other rents, issues, and profits of the same hereditaments, to receive and take the said annuity unto the Petitioner for the term of 100 years thenceforth next ensuing, if the Marquis should so long live, the annuity to be

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payable and paid by four equal quarterly instalments on the 7th of April, July, October, and January in each year, the first of such payments to be made on the 7th of April, 1864, if the Marquis should be then living, together with a proportionate part of the annuity for the time which should elapse between the date of the indenture, or the last quarterly payment (as the case might be), and the death of the Marquis; and the Petitioner was thereby empowered, on the annuity being in arrear for twenty-one days, to enter into and upon the said hereditaments and distrain for the same annuity, and all arrears thereof, as if the same were a rent reserved in a lease for years, to the intent that the Petitioner might thereby or otherwise be fully paid and satisfied the said annuity and all arrears thereof. And the Marquis thereby also granted to the Petitioner, that so often as the said annuity, or any part thereof, should be in arrear and unpaid by the space of forty days after any one of the days thereby appointed for payment thereof, then and so often as it should happen, and either on or at any time after the expiration of the said forty days, it should be lawful for the Petitioner, his executors, administrators, or assigns, although no legal or formal demand should have been made of the said annuity, into and upon the said hereditaments to enter, and the same to hold and enjoy, and the rents and profits thereof to receive and take, until he should thereby or otherwise be fully paid the said annuity and all arrears thereof, and all costs, charges, damages, and expenses occasioned by the non-payment thereof. And it was thereby further witnessed, that for further securing the said annuity the Marquis, at the request of the Petitioner, demised to *Charles Baker* the same hereditaments, with the appurtenances, to hold the same unto the said *Charles Baker* for the term of 200 years from thence next ensuing, if the Marquis should so long live, and without impeachment of waste, nevertheless upon the trusts thereinafter declared; and it was thereby declared that the term was granted upon trust for the better securing the due and regular payment of the annuity, and that in case and when and so often as the same or any quarterly payment, or any part thereof, should be in arrear for sixty days next after any one of the days thereinbefore appointed for payment thereof, *Baker* should, by and out of the yearly rents and profits of the heredita-

ments thereby demised, or by any mortgage thereof, or of a competent part thereof, for all or any part of the said term of 200 years, or by bringing actions against or making distresses upon the tenants of the said hereditaments for recovery of the rents then in arrear, or by making entries on the same hereditaments, and also by granting leases for any term of years not exceeding twenty-one years, determinable nevertheless with the term of 200 years, of any farms which should be untenanted, as often as the Marquis should not provide tenants for the same at a fair and reasonable rent, or by all and every or any one or more of the ways and means aforesaid, levy and raise the arrears of the annuity, together with the costs, charges, and expenses occasioned by the non-payment thereof and attending the execution of the trusts of the said term of 200 years: And upon further trust that *Baker* should, in the first place, retain and reimburse himself his costs, charges, and expenses; and, in the next place, pay to the Petitioner all the arrears of the annuity of £960, and all costs, charges, and expenses occasioned by the non-payment thereof: And upon further trust that in the meantime, and until some quarterly payment thereof should be in arrear for the space of sixty days as aforesaid, and also from time to time, when and so often as all arrears of the same annuity, and the said costs, charges, and expenses, should be raised or fully satisfied and paid, *Baker* should permit the Marquis, or his assigns, to receive and take the yearly rents and profits of the said hereditaments and premises: And upon this further trust that *Baker*, his executors, administrators, or assigns, should from time to time, after payment of the annuity, and after deducting, paying, and retaining such costs, charges, and expenses as aforesaid, pay to the Marquis, his executors, administrators, or assigns, the money (if any) which from time to time should remain in his or their hands unapplied to any of the purposes aforesaid. And the indenture contained a covenant on the part of the Marquis for payment of the annuity.

The Marquis died on the 7th of February, 1869. Shortly afterwards this suit was instituted by a creditor for the administration of his estate, and the usual creditor's decree had been made.

At the time of the Marquis's death the sum of £560 was due to the Petitioner in respect of the annuity. This sum was made up as follows: £480 for the half year ending the 7th of January, 1869,

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and £80 for the interval between that date and the day of the Marquis's death.

The apportioned part of the rents of the hereditaments comprised in the deed of the 7th of January, 1864, for the period between the quarter-day last preceding the death of the Marquis and the 7th of February, 1869, was received by the Defendant in the suit and paid into Court to a suspense account.

A Petition was now presented by *William Watkins* for payment to him of the arrears of his rent-charge out of the fund standing to the suspense account. Neither the Petitioner nor *Baker*, his trustee, had ever entered upon any of the hereditaments on which the annuity was charged.

Mr. *Fry*, Q.C., and Mr. *Cracknall*, for the Petitioner:—

The Petitioner claims under the provisions of the *Apportionment Act* (4 & 5 Will. 4, c. 22), s. 2, which provides in effect that where a tenant for life dies, his executors, administrators, or assigns shall be entitled to a proportion of the rents according to the time which has elapsed between the last day of payment thereof and the day of the death of the life tenant, and that the executors, administrators, and assigns shall have the same remedies at law and in equity for recovering such apportioned parts as they would have for recovering the entire rents, but so that the persons liable to pay the rents shall not be resorted to, but the entire rents shall be received by the person who would have been entitled to such entire rents but for the passing of the Act; and the apportioned parts are to be recoverable from such person by the parties entitled in an action at law or a suit in equity. Now the Petitioner, as grantee of a rent-charge, and *Baker*, as grantee of a term of years, were assigns of the Marquis's life interest. That interest included the apportioned part of the rents for the time which elapsed between the last day of payment and the death of the Marquis; and we submit that though the death of the Marquis prevented the Petitioner or *Baker*, his trustee, from entering on the demised hereditaments, still the Petitioner is, by virtue of the statute, entitled to recover the arrears of his annuity out of that apportioned part of the rents, and from the person who received it.

[The MASTER OF THE ROLLS:—Does the Act give a title to any

one who had not title at the death of the tenant for life? As regards your rent-charge (which ceased at the Marquis's death), you could not have recovered the rents from the tenants in the Marquis's lifetime without giving notice to them to pay you; and as regards your term, you had no legal estate, it was a mere *interesse termini.*]

We submit that the Act extends the interest of the Petitioner in respect of his rent-charge beyond the death of the Marquis, although it is true that in consequence of that event the Petitioner can no longer enter and pay himself.

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., Mr. *Graham Hastings*, and Mr. *Simpson*, for the parties to the suit, were not called upon.

SIR G. JESSEL, M.R.:—

I cannot allow this claim. It is to me a novel idea that the *Apportionment Act* enables a mortgagee, not being in possession, to get more than he would have had but for that Act. If the mortgagee had been in possession, no doubt he would have got all that the tenant for life was entitled to; but I fail to follow the argument that the Act gives a right to any person to an apportioned part of the rent, although that person would not have had a right to the entire rent if the day for payment of the rent had arrived. In truth, a mortgagee who has not entered is not an assign within the meaning of the Act. An assign is a person who would be entitled to the whole quarter's rent; but a mortgagee would not be entitled to the whole quarter's rent unless he had entered. In this case, supposing there had been six months' rent due to the Marquis on the last quarter-day preceding his death, and that he died a month after the quarter-day, the six months' rent remaining unpaid, it is not contended that the mortgagee could have claimed the six months' rent, but it is said he can get the apportioned part of the rents for one month. I do not see how that can be. It appears to me that the Act does not apply between a mortgagor and his mortgagee who is not in possession. I think that a mortgagee who is not in possession is not an assign within the meaning of the Act. The Petition must, therefore, be dismissed.

Solicitors: Messrs. *Watkins, Baker, & Baylis;* Messrs. *Waller & Handson;* Messrs. *Horn & Murray.*

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Jan. 21, 22.

CAPRON *v.* CAPRON.

[1873 C. 279.]

Apportionment Act, 1870 (33 & 34 *Vict. c.* 35)—*Devise of Real Estate—Apportionment between Executor and Devisee.*

A testator seised in fee devised real estate by a will dated before the *Apportionment Act*, 1870, and confirmed by a codicil dated after the Act:—

Held, that the rents were apportionable between the executor and the devisee.

Semble, that the result would have been the same without the codicil.

Jones v. *Ogle* (1) considered.

SPECIAL CASE.

George Capron, by his will, dated the 2nd of April, 1866, after bequeathing certain specific and pecuniary legacies, gave and bequeathed several life annuities, payable quarterly as therein mentioned, the first payment thereof respectively to be made at the expiration of three calendar months after his decease; and he directed that a proportionate part of each of the several annuities should be payable up to the day of the determination thereof, in case of the same determining on any other than one of the quarterly days thereinbefore appointed for payment thereof; and he directed that all the said annuities should be charged upon and payable out of the rents, issues, and profits of his hereditaments in the county of *Northampton* next thereinafter devised in exoneration of all his other real and personal estates. And the testator thereby gave and devised all his manors, advowsons, capital, and other messuages, lands, tenements, and hereditaments, situate and being in the said county of *Northampton* (or such part or parts thereof as were freehold of inheritance), with their and every of their rights, members, and appurtenances, unto and to the use of *G. H. Capron*, *W. H. Brabant*, and *J. W. Bateman*, their heirs and assigns, upon trust to raise by mortgage such sum or sums of money as should be required for payment of such (if any) of his just debts and pecuniary legacies bequeathed by his will, and other capital moneys thereby directed to be paid, as his personal

(1) Law Rep. 8 Ch. 192.

estate not otherwise disposed of should be insufficient to pay. And he declared his will to be that, subject to the trusts thereinbefore declared, the said trustees, or the survivors or survivor of them, or the heirs of such survivor, or their or his assigns, should, by such deeds, conveyances, surrenders, or other assurances, and in such manner as counsel should advise, convey, settle, and assure all and singular the manors, hereditaments, and premises in the said county of *Northampton*, subject to subsisting mortgages (if any); and also, subject to and after making due provision for securing the payment, out of the rents, issues, and profits thereof, of the annual sums thereinbefore directed to be paid thereout, to the use of his eldest son, the Defendant *George H. Capron*, and his assigns for life, with remainder to the use of his grandson, the Plaintiff *George H. Capron*, the eldest son of the Defendant *George H. Capron*, and his assigns for life, with remainder to the use of each son of the grandson successively in tail male, with remainder to the use of his grandson, *Theodore H. S. Capron*, for life, with remainder to each of his sons successively in tail male, with remainder to each younger son of the Defendant *G. H. Capron* born during the testator's life, for their lives and for their children successively in tail male, with remainder to each son of the Defendant *G. H. Capron* born after the death of the testator successively in tail male, with remainder to the use of the testator's other children in strict settlement, with an ultimate remainder to such person or persons as should, at the time of the failure of the previous limitations, be his heir or co-heirs at law, his, her, or their heirs and assigns, for ever.

And the testator gave all his residuary personal estate and effects to his trustees upon trust to convert into money, and, after payment of his debts, funeral expenses, legacies, and other charges, to invest the surplus in the purchase of lands to be settled upon the same trusts as were declared by his will as to his estates in the county of *Northampton*.

The testator made a codicil to his will, dated the 1st of July, 1871, and thereby, after giving a life interest which he had purchased in certain trust funds, and after bequeathing the several pecuniary and specific bequests therein mentioned, and giving directions respecting the discontinuance of certain allowances made

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by him as therein mentioned, the testator in all other respects thereby ratified and confirmed his will.

The testator died on the 24th of April, 1872, and the freehold, copyhold, and leasehold estates of which he died seised and possessed consisted exclusively of hereditaments in the county of *Northampton*, all of which had been acquired by him previously to the date of his will.

The rents of such part of the testator's estate as were let to tenants at the time of his death were payable by the tenants thereof half-yearly—that is, on Lady Day and Michaelmas in each year—the said net half-yearly rents amounting to the sum of £2820 17*s.* 5*d.* The whole of the rents becoming due at Michaelmas, 1872, had been received by the Defendant *G. H. Capron* as first tenant for life of the *Northampton* estates.

The question for the opinion of the Court was whether the said sum of £2820 17*s.* 5*d.* ought not to be apportioned, under the *Apportionment Act*, 1870, as at the death of the testator, and divided between the persons entitled to the residuary personal estate on the one hand, and the first tenant for life on the other hand.

Mr. *Cotton*, Q.C., and Mr. *O. A. Saunders*, for the Plaintiffs :—

This case raises the neat question whether, under the *Apportionment Act*, 1870 (33 & 34 Vict. c. 35), there is to be an apportionment of the rents derived from real estate devised by a testator seised in fee of those estates, to his son for life, with remainder to his son's children in strict settlement. The 2nd section of the Act may be shortly read thus:—"That from and after the passing of the Act all rents shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." These are rents arising from the devised estates, and are therefore distinctly within the very words of the Act, and must be apportioned accordingly.

Several cases have lately come before the Courts in which questions have arisen under this Act, but the particular point now raised has never been discussed. In *Whitehead* v. *Whitehead* (1) your Honour decided that a specific legacy was not within the Act; and in *Jones* v. *Ogle* (2) the Court of Appeal decided that divi-

(1) Law Rep. 16 Eq. 528. (2) Law Rep. 8 Ch. 192.

dends in respect of profits earned by a mining company during the previous year, which were declared yearly, did not come within the terms "dividend" or "periodical payment," and were therefore not apportionable; but these cases have clearly no bearing upon this question; and the case of *Browne* v. *Amyot* (1) arose under the *Apportionment Act* 4 & 5 Will. 4, c. 22, to remedy the defects of which Act this statute was passed.

This case is also concluded by the fact that the testator, by a codicil dated the 1st of July, 1871, confirmed his will, and therefore republished it after the passing of the Act.

Mr. *Everitt*, and Mr. *Kekewich*, for the Defendants:—

The first question which arises is, whether the testator intended that the rents of his estate should be received by his devisee, or not? Now the will was made in April, 1866, long before the passing of the *Apportionment Act*, and at that time the law clearly was that the rents of real estate would not be apportioned between the devisee and the testator's general personal estate. It is to be assumed that the testator knew what the law was at the time of making his will, and that he did know it is evident from the words used with reference to the annuities given in the first clause of the will; he there says, the first payment of such annuities to be made at the expiration of three calendar months after his decease, and he directed that a proportionate part of each of the several annuities should be payable up to the day of the determination thereof respectively, in case of the same determining on any other than one of the quarterly days of payment. Therefore he had in his mind the question as to apportionment, and he devises his estate in such a manner as that under the then existing law the rents would not be apportionable. Then we have the authority of the Lord Chancellor, expressed in the case of *Jones* v. *Ogle* (2), for saying that, in considering a will in reference to this Act, you must construe the words according to the law in force at the time the testator expressed himself, and this Court will not allow the testator's intention to be perverted. Lord *Selborne* in that case said (3): "If it were necessary to

(1) 3 Hare, 173.

(2) Law Rep. 8 Ch. 192.

(3) Law Rep. 8 Ch. 195.

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decide, I should have very great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act passed. If a will had been made afterwards, I can quite follow the argument which would say that in such a case a testator makes his will having the Act of Parliament in view, and that the words he uses are not to be construed without regard to the Act of Parliament. But I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made." The principle of that decision is, that you are to look at the will to see what the intention of the testator was at the time he made it, and it would be a great hardship to make this Act alter what the testator must have intended to do. In fact, we contend that the Act does not apply to wills made before the passing of the Act; and the intention of this testator is still more clearly expressed by the fact that the annuities given by him are charged upon his *Northampton* estates, and the first payment of such annuities is to be made at the expiration of three months after his decease. That shews that the devisee was to take the rents, or he would have nothing out of which to pay the first instalment of the annuities. The codicil, although it contains the formal words that in other respects the testator ratified and confirmed his will, was made for a special purpose, and not with the intention of republishing the will so as to make it speak from the date of the will.

Mr. *Rawlins*, for the trustees, cited *Roseingrave* v. *Burke* (1).

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

This is a special case raising a point of very great and general importance on the construction of the *Apportionment Act*, 1870, and one which, no doubt, has been the subject of difference of opinion. I know from my own personal knowledge that some persons have had great difficulty in administering estates in the absence of judicial construction of the Act.

(1) 7 Ir. Rep. Eq. 186.

The point is this: a testator seised in fee devises his estate for life, with remainder over in strict settlement; but it will make no difference whether he devises in strict settlement, or to a person in fee. The question is, whether, in the case of a testator seised in fee dying in the middle of a half year or other periodical payment, there is an apportionment in favour of his personal representative, or whether the devisee who will be the owner of the estate when the next half yearly or quarterly payment, or whatever it may be, becomes due, is to have the entire rent. The law before this Act was passed was perfectly plain. In all cases of money lent on mortgage with interest falling due from day to day, if the mortgage debt was given, the personal representative would have the interest, or so many days' interest as, taking it from day to day, would have accrued up to the day of the testator's death; but in this particular case there would not be an apportionment between the estate of the devisor and the devisee. The estate of the devisor would have had no portion of the accruing rent, and the devisee, who was the owner of the estate when the debt became actually due, would have the half yearly or periodical payment. This being a very defective state of things, this Act of 1870, as I understood at the time, and as I collect from its terms, has for its object the making of apportionments generally. It is an Act intituled, "For the better apportionment of rents and other periodical payments." Then it recites "that rents and some other periodical payments are not apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed. And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences." Then it is enacted, "That from and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Now, therefore, as I read it, the intention of the Legislature is to assimilate rent to money lent. In this case, if, instead of the testator being the owner of these estates, he had been the owner

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of money lent on mortgage, it is clear that the interest of the money would have been apportionable. I take it that the provision I have just read applies to this very case. Here is the case of a testator devising his estate and not saying a word about the accruing rent, and therefore, the accruing rents falling due from day to day, every day there is a specific sum which becomes due, and consequently, as many days interest as have elapsed since the last quarterly or half yearly payment became due, in my opinion, are apportionable, and go in favour of the general personal representative, and do not go to the devisee of the estate; and I may say that that would be my interpretation of the statute, independently of any decision; but the Vice-Chancellor of *Ireland*, in the case of *Roseingrave* v. *Burke* (1), which, although it seems to have been decided in Chambers, received his serious attention, came to precisely the same conclusion. I was not aware of it when I formed this opinion in my own mind. I find a very elaborate report of that case in the Irish Equity Reports. It is the opinion of an able Judge, carefully considered, and it is in exact accordance with the opinion I have come to on the terms of the Act; and although it was argued in Chambers, I do not think I can regard it with less authority on that account. It was argued by counsel, and it does not seem to me to make much difference whether it was decided in one room or in another. Therefore I think it is a good authority.

Then it is said that there is a great difference in consequence of the decision of the full Court of Appeal in *Jones* v. *Ogle* (2). Of course I need not say that if the point had been decided by the Court of Appeal, I should not have allowed it to be discussed before me, but I should have followed the decision; indeed Mr. *Cotton* would not have asked me to do otherwise; but I find that it is clear the point has not been decided in *Jones* v. *Ogle*. That case turned upon the particular words of the will, which were: "As to the share and interest which I have in the *Lilleshall Iron Company*, I bequeath the dividends and income thereof to my uncle, *J. T. Ogle*, for his life, and after his death the same share and interest shall belong to his two daughters in equal shares;" and he gave his residuary estate to trustees upon trust

(1) 7 Ir. Rep. Eq. 186. (2) Law Rep. 8 Ch. 192.

as therein mentioned, and appointed the Plaintiff his executor. The decision of the Court of Appeal, affirming the view of the Master of the Rolls, turned on the effect of those words. If a man says, "I give all the dividends I am able to give," does not that include the whole of the dividends irrespective of any apportionment? So, upon the same principle, I should have said in this case if the testator had used the words, "I give my lands and all the rents accruing for or in respect thereof," that would have been, like *Jones* v. *Ogle* (1), an express gift of accruing rents; and as the cardinal point in construing wills is to ascertain the testator's intention, there can be no doubt that in such a case the accruing rents would pass.

But I am bound to say there are some observations of the Lord Chancellor, which seem rather to favour the argument, or to raise a doubt at all events, whether the Act of 1870 is to apply to wills already made, or made before the passing of the Act. There is no decision on the subject, and therefore I cannot regard it as fettering my opinion in this case, and I think the true answer to such a statement is this—that if the Legislature had intended the Act not to apply to instruments already executed, it would have said so. But the words of the Act are very general, and it takes effect from the time of its passing. Its general enactment is, "Be it enacted that from and after the passing of this Act, all rents shall, like interest on money lent, be considered as accruing from day to day." Therefore it is perfectly clear to my mind that it was intended to apply to all instruments which, at all events, should come into operation after the passing of the Act, and the will does come into operation after the passing of the Act, supposing the testator dies after it passed. Every testator is presumed to know the law. This testator made his will in 1866, and as he re-published it in 1871 by a codicil made after the passing of the Act, he must be considered as repeating every word of it at that time. Therefore, although I do not decide it on that point, I am much inclined to think that it does fall within the 24th section of the *Wills Act*, which prescribes, "That every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by

(1) Law Rep. 8 Ch. 192.

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the will." At all events this testator confirms and republishes his will by the codicil in 1871, and I think he must be considered as repeating every word of his will at that time. In that sense, therefore, the will is made after the passing of the Act. It is very material to observe that the *Apportionment Act*, 4 & 5 Will. 4, c. 22, does provide that it shall apply to all payments coming due at a fixed period under any instrument to be executed after the passing of that Act, or (being a will or testamentary instrument) that shall come into operation after the passing of that Act; in other words, where the testator shall die after the passing of the Act. That Act expressly provides that it shall apply to all wills at whatever period they come into operation after the passing of the Act. It is to the last degree improbable that the Legislature, whose object was to generalise these enactments, should have intended it to have a narrower operation in this case than it would under the 4 & 5 Will. 4, c. 22.

Therefore, upon the ground that the enactment is most general, my opinion is that it must apply to all cases at whatever times the instrument is executed, provided it comes into operation after the passing of the Act; and that being so, the Act applies in this case, and the rent must be taken just the same as interest accruing from day to day, and, consequently, I am of opinion that there must be an apportionment between the devisee and the personal representative of the testator.

Solicitors for all the Parties: Messrs. *Clarke, Son, & Rawlins.*

NOKES *v.* GANDY.

V.-C. M.
1874
Jan. 26.

County Court Appeal—Administration Suit in County Court—Action by Creditor of Intestate—Injunction before Decree—Ex parte Order—County Court Orders in Equity, 1865, *Ord.* I., *r.* 8; *Ord.* XII., *r.* 1.

Notwithstanding that, by Order I., rule 8, of the County Court Orders in Equity, 1865 (1), a decree cannot be made till a month after the plaint has been filed, a County Court Judge has not jurisdiction under Order XII., rule 1, of the County Court Orders in Equity, 1865 (2), in a creditor's administration suit before decree, or on an *ex parte* application, to restrain a creditor's action commenced previously to the institution of the suit.

THIS was an appeal from a decision of the Judge of the County Court of *Chelmsford*.

William Gandy the younger died intestate on the 4th of August, 1873, indebted to *Thomas Richardson* in the sum of £75 9*s.* 9*d.* for goods sold and delivered. After his death *Alfred Darby* took possession of and sold by auction the household furniture and effects and trade property of the intestate, and he also collected debts due to the intestate's estate.

On the 13th of October, 1873, *Thomas Richardson* brought an action in the Court of Exchequer against *Alfred Darby*, as executor *de son tort* of the intestate, to recover the debt of £75 9*s.* 9*d.*, and the writ was served the next day.

(1) Order I., rule 8, is as follows:—"The summons shall be in the form in the schedule, and be dated of the day on which the plaint was filed, and may be returnable at any court to be holden not less than one calendar month, nor more than three calendar months, from the filing thereof."

(2) Order XII., rule 1, is as follows:—"Wherever in any suit or proceeding it shall become necessary to secure the possession of any property, or to obtain security from any person for any moneys in his possession, or to enforce the deposit or the payment into court thereof pending litigation, or the immediate sale of any goods or chattels, and the deposit or payment into Court of the purchase-money thereof, or to obtain an order in the nature of an injunction, any party may apply *ex parte* to the Judge, either in or out of court, upon affidavit setting forth the facts rendering such order immediately necessary; and upon such application the Judge may either make an order absolute in the first instance, or make an order to be absolute at any time to be ordered by him, unless cause be shewn to the contrary; or may make such other order or give such directions in the matter as the Judge may think fit, and may order immediate execution."

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On the 18th of October, 1873, letters of administration to the intestate's estate and effects were granted to his father, *William Gandy* the elder, during the minority of his two infant children.

On the 22nd of October, 1873, *Albert Nokes* filed a plaint in equity in the County Court at *Chelmsford* against *William Gandy* the elder and *Alfred Darby* for the administration of the personal estate of the intestate.

Under Order I., rule 8, of the County Court Orders in Equity, 1865 (1), no decree can be made in any suit in equity till the expiration of one calendar month from the filing of the plaint.

On the 23rd of October, 1873, and consequently before decree, and on the *ex parte* application of the Plaintiff, *Albert Nokes*, supported merely by an affidavit alleging that it was doubtful whether the Plaintiff in equity had any defence to the action at law, and stating that if the Plaintiff in the action obtained judgment he would gain priority over the other creditors of the intestate, the County Court Judge made an order in the nature of an injunction to restrain the action which had been commenced by *Richardson*.

On the 6th of November, 1873, *Richardson*, the Plaintiff in the action, served the Plaintiff in the suit with notice of a motion for the 11th of November, 1873, to discharge the injunction. This last-mentioned motion was heard by the County Court Judge on the 11th of November, when he held that, looking to the Act giving equity jurisdiction to the County Court, and the Rules and Orders for regulating the practice thereunder, he had power to make the order sought to be set aside; and further, that to prevent the creditor obtaining payment in full, or incurring costs unnecessarily at the expense of the estate to be administered, and to the detriment of the general body of creditors, the injunction was necessary and proper under the circumstances, and he accordingly refused with costs the motion to dissolve it.

The Plaintiff thereupon appealed, the questions left for the opinion of the Court being, whether the Judge of the County Court had power to make the *ex parte* order of the 23rd of October, 1873, and whether he ought to have made an order in the terms of the notice of motion of the 6th of November, 1873.

(1) *Ante*, p. 297.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the Appellant:—

It is not the practice of this Court in a creditor's suit to grant an injunction restraining an action by a creditor against the personal representative or the person in possession of the estate of a deceased debtor before decree in the suit, or on an *ex parte* application. In this case, moreover, the action restrained was against the executor *de son tort*, who can only discharge himself by handing over the goods to the rightful representative before action commenced: *Curtis* v. *Vernon* (1); *Coote* v. *Whittington* (2); *Hill* v. *Curtis* (3).

Mr. *Cotton*, Q.C., and Mr. *Begg*, for the Respondent:—

The County Court Judge proceeded under rule 1 of the 12th Order of the County Court Orders in Equity (4). Inasmuch as by Order I., rule 8, no decree in a suit in equity can be made till the expiration of a month after the plaint has been filed, it is necessary, in order to protect the property for the benefit of all the creditors, that the Judge should have the power of granting an injunction before decree, and *ex parte*, and being necessary the jurisdiction is given by Ord. XII., rule 1; and though in this Court such an order would not be made, the County Court Judge has taken a reasonable view of the jurisdiction given by this last-mentioned Order, and this Court will not interfere with his discretion. If the question is not one of discretion, it is one of practice; and the practice of County Courts must be judged of by the Orders in force in them.

Mr. *Glasse*, in reply:—

This rule does not enlarge the jurisdiction of the County Court Judge. He has only the powers of a Vice-Chancellor of this Court, and if a Vice-Chancellor cannot make such an order as has been made in this matter, the County Court Judge cannot do so.

SIR R. MALINS, V.C., after referring to the facts, continued:—

Nothing is more clear than that this Court will not restrain an action by a creditor against the representative of a deceased debtor

(1) 3 T. R. 587.
(2) Law Rep. 16 Eq. 534.
(3) Law Rep. 1 Eq. 90.
(4) *Ante*, p. 297.

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till he has obtained an equivalent for the judgment which would have been his right in the action—that is, till after a decree has been made in the suit, which operates as a judgment for the benefit of all the creditors. If, therefore, an application for an injunction is made before a decree has been obtained, it must be refused.

As to the other question, no case can be found in which such an action has been stayed *ex parte*, even after a decree. It is clearly the right of the Plaintiff in such an action to have an opportunity of being heard against such an order.

Solicitors: Mr. *Woodard;* Messrs. *Duffield & Bruty.*

V.-C. M. 1874 Jan. 16.

In re ROW.

Practice—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 69—*Tenant in Tail—Payment out of Court—Disentailing Deed.*

Where a fund paid into Court under the *Lands Clauses Consolidation Act*, 1845, is claimed on petition by a person who would have been the tenant in tail of the land represented by the fund, it is unnecessary for him to execute a disentailing deed as a condition of having the fund paid out to him.

In re Butler's Will (1) not followed.

THIS was a Petition for payment out of Court of a sum of £438 7*s.* 1*d.* consols and £19 8*s.* 6*d.* cash, which had been paid into Court on the 16th of November, 1852, by the *Great Western Railway Company* under the 69th section of the *Lands Clauses Consolidation Act*, 1845 (8 Vict. c. 18), as the purchase and compensation money for certain land taken by them under the powers of one of their Acts, and to which at the time a title could not be made.

The Petitioner now claimed to be entitled to the fund in Court, as being the person who would have been tenant in tail of the land taken if it had remained *in specie*.

The question was raised whether it was necessary for him to execute a disentailing deed before receiving the proceeds of the fund in Court.

(1) Law Rep. 16 Eq. 479.

Ref. see Re Broadmore 10 Ch D. 438 M.R.

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In re Row.

Mr. *E. S. Ford*, for the Petitioner :—

A long series of cases shews the almost uniform practice of the Court to have been not to require a disentailing deed on payment of a fund out of Court. There are only two known decisions to the contrary effect. One of them is *In re Butler's Will* (1), which recently came before the Lord Chancellor, sitting for the Master of the Rolls, and has caused the necessity for mentioning the point now. But it may be doubted whether the question was fully argued; for it appears from the report of that case that the only authorities cited were *In re South-Eastern Railway Company* (2) and *Notley* v. *Palmer* (3). The other adverse decision was by Vice-Chancellor *Kindersley* in *Re Tylden's Trust* (4), and *Notley* v. *Palmer* was a later decision by the same Judge the other way.

Mr. *Gifford*, for the company, mentioned *Re Watson* (5) as a decision of the Lords Justices in favour of not requiring a disentailing deed.

Mr. *Pemberton*, the Registrar then in Court, stated that the practice in the office was to have the petitions stamped as disentailing deeds.

Sir R. Malins, V.C. :—

It is very important that this question as to the necessity for a disentailing deed, should be settled. And, considering that the decision which has caused the present difficulty is that of the present Lord Chancellor, I think that, though it was made when he was sitting for the Master of the Rolls, it would not be respectful for me to follow my own opinion. I therefore desire that the Petition may be mentioned to the Court of Appeal at my request, in order that, on the representation of the difficulty, the question may be settled without putting the parties to the expense of an appeal.

Later in the day Mr. *Ford* stated that he had mentioned the matter to the full Court of Appeal, but that their Lordships

(1) Law Rep. 16 Eq. 479.
(2) 30 Beav. 215.
(3) Law Rep. 1 Eq. 241.
(4) 11 W. R. 869.
(5) 10 Jur. (N.S.) 1011.

17 Jur. N.S. 965
9 Jur. N.S. 942.

V.-C. M. 1874 *In re* Row.

considered that they could not entertain the question unless it were brought before them either on an appeal motion or on an original petition.

He then referred to *Re Holden* (1), in which the late Lord Chancellor *Hatherley*, when Vice-Chancellor *Wood*, had decided that a disentailing deed was unnecessary, and *Re Holden's Estate* (2), in which Vice-Chancellor *Stuart* had taken the same view.

Sir R. Malins, V.C.:—

Daniell's Chancery Practice has just been put into my hands, and I see from the cases there referred to (3), that the great preponderance of authority is in favour of not requiring a disentailing deed. On that view I will make the order for payment out of the fund without requiring a disentailing deed, and, until the Court of Appeal decide the contrary, I will act upon this rule.

Mr. *Glasse*, Q.C., as *amicus curiæ*, referred to the analogous case of a payment out of Court of a fund representing real estate of a married woman, in which case it is unnecessary to go through the form of executing an acknowledged deed, the Petition being considered as equivalent.

Sir R. Malins, V.C.:—

Whatever be the origin of the rule, I consider that it has been sanctioned by the Lords Justices *Turner* and *Knight Bruce* in *Re Watson's Trust* (4); and, as far as I am concerned, it shall remain undisturbed.

Solicitors: Messrs. *Warry, Robins, & Burges;* Messrs. *Young, Maples, & Co.*

(1) 1 H. & M. 445.
(2) 10 Jur. (N.S.) 308.
(3) 5th Ed. p. 1656.
(4) 10 Jur. (N.S.) 1011.

SNELLING *v.* THOMAS.

V.-C. B.
1874
Jan. 23, 24.

[1871 S. 128.]

Specific Performance—Statute of Frauds—Written Contract afterwards varied by Parol Agreement.

Plaintiff, the owner of six leasehold houses, agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and as he (Plaintiff) alleged, agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house No. 737 and a third house, numbered 739, to *G. T.*, also a grocer, and the agreement, which was in writing and dated the 6th of July, 1870, contained nothing about a restrictive covenant, but an underlease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the underlease and counterpart on a certain day; but on the previous evening, *G. T.* died suddenly, intestate. It was stated, but on the Plaintiff's evidence only, that after the written agreement of the 6th of July, and before *G. T.'s* death, *G. T.* verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shewn that the insertion of such a restriction would considerably diminish the value of the property:—

Held, that the Defendant, the administrator of the intestate, could not be compelled to execute a counterpart of a lease containing such a restriction.

The written agreement of the 6th of July stipulated that the property should be bought "subject to the existing tenancies." The Plaintiff alleged that on the 6th of July the lessee of the house No. 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the day before the agreement of the 6th of July, was produced, containing such a covenant. It having been shewn that the lease was antedated and was not in fact executed till after the 6th of July, 1870:—

Held, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction.

Circumstances under which acceptance of a verbal alteration in a written agreement will not be inferred.

MOTION for decree.

In February, 1867, a lease for a term of eighty-eight years, less three days, from the 24th of June, 1823, of six houses in the *Old Kent Road, Camberwell, Surrey*, at a rent of £66, became vested in *William Stark*.

V.-C. B. 1874 SNELLING v. THOMAS.

In January, 1870, the Plaintiff, *Frederick Snelling*, entered into an agreement with *Stark*, that in consideration of his (*Snelling's*) building shops on the forecourts of these houses, he should become entitled to leases of the houses, with an option of purchasing *Stark's* interest; and *Stark's* interest was afterwards assigned to *Snelling*.

By a written agreement dated the 24th of March, 1870, *Snelling* agreed, before the following Midsummer Day, to grant to *George Sowman*, a ham and beef seller, a lease of one of the houses, numbered 737, for a term of not less than forty years, from Lady Day, 1870. The agreement did not contain any stipulation as to any restrictive covenant. Under this agreement *Sowman* entered into possession.

By another agreement of the same date *Snelling* agreed to grant to *Charles Albert Carter*, a grocer, a lease of another of the houses, numbered 735: and *Snelling* thereby agreed not to let either of the other five houses to be used as a grocer's or cheesemonger's shop.

In about June, 1870, one *George Thomas*, a grocer, agreed to purchase the interest of *Snelling* in the house numbered 737, and in another numbered 739; and on the 6th of July, 1870, *Snelling* and *Thomas* met at the office of Messrs. *Jenkinson*, *Snelling's* solicitors, and there signed an agreement, whereby *Snelling* agreed to sell, and *Thomas* agreed to buy, the two houses for £1000. It was agreed that the purchase should be completed on the 11th of August following, and that on completion the purchaser should have possession and be entitled to the rents and profits, "subject to the existing tenancies." The vendor agreed, on completion, to grant an underlease, and it was agreed that the underlease should contain "covenants similar to those contained in the original lease so far as the same may be applicable."

An underlease was accordingly prepared by the solicitors, acting for both parties, and in it was inserted a covenant not to carry on upon the demised premises the trade or business of a grocer and cheesemonger. On the 11th of August *George Thomas* called at Messrs. *Jenkinsons'* office, and saw Mr. *Atchley*, the conveyancing clerk who had drafted the underlease. According to Mr. *Atchley's* evidence, what took place was as follows:—

"I saw him (*Thomas*) upon this occasion, and informed him of

the instructions the Plaintiff (*Snelling*) had given me with regard to the restriction as to carrying on the business of a grocer or cheesemonger upon the said premises, and he replied that it was quite right, and that that was the arrangement made between himself and Mr. *Snelling*, although it was not so expressed in the written agreement, and I there and then at his request handed him the draft lease, . . . and he read the same carefully through, occasionally asking some explanation, but without much comment, until he came to the restrictive covenant in the said lease, when he said, 'Oh, this is the part, is it? Well, I don't see any objection to that;' or 'that is quite right;' or words to that effect. He then left the said office with the expressed intention of attending again on the next day at two o'clock to execute the lease."

An engrossment of the draft lease was made; but on the evening of the same day, the 11th of August, *George Thomas* died suddenly, intestate; and on the 31st of August, 1870, letters of administration were granted to the Defendant, *John Thomas*.

At some period after the death of *George Thomas*, it did not appear when, a lease of the house, No. 737, was executed by *Snelling* to *Sowman*, whereby the premises were demised to him for forty-one years and a quarter, less ten days, from Lady Day, 1870, at a rent of £65, and *Sowman* thereby covenanted not to carry on, or permit to be carried on upon the premises, the business or trade of a grocer or cheesemonger. This lease was antedated the 5th of July, 1870, the day before the date of the above-mentioned agreement with *George Thomas*.

The administrator, who lived in *Yorkshire*, was desirous of selling the property, and employed as his solicitors Messrs. *Bridger & Collins*. On the 17th of August, 1870, one of the Messrs. *Bridger & Collins* called at Messrs. *Jenkinsons'* office, and having heard that an underlease had been prepared and was to have been executed on the day after Mr. *Thomas* died, borrowed the draft. He said that after glancing through it, and estimating, for the purposes of the administration, the value of the contract to be £250, he had it copied by a law stationer.

On the 27th of August another of the Messrs. *Bridger & Collins* called at Messrs. *Jenkinsons'* office, and returned the draft.

On the 13th of September, 1870, the property was put up for

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sale. In the particulars it was described as follows:—"Lot 2. The benefit of a contract for the purchase of two commanding shops," (describing them). "No. 737 is let to Mr. *George Sowman*, provision merchant, at a rental of £65 per annum, who is desirous of having a lease for the whole term at the same rent. A lease has been prepared but not executed. No. 739 is in hand, and is of the estimated value of £75 per annum. . . . The underlease has been prepared and engrossed in pursuance of the agreement, and was to have been executed the day the intestate died. . . . The contract for purchase and engrossment of the lease . . . can be seen at the offices of Messrs. *Jenkinson & Son*." . . . The 9th condition stated that the proposed lease and the contract, or abstracts or copies thereof, could be inspected at the offices of Messrs. *Bridger & Collins* on the day prior to the sale, "and may also be seen at the time of sale; and every purchaser shall be deemed to buy with full notice of the contents of such documents."

No sale of Lot 2 was effected at the auction.

In November, 1870, Messrs. *Bridger & Collins* called for an abstract of *Snelling's* title to the two houses, which was furnished on the 4th of November. The only documents abstracted were the original lease in 1823, and the assignment by *Stark* to *Snelling* in 1870, neither of which disclosed any restrictive covenant, and no objections or requisitions were made; but about the 18th of November Messrs. *Bridger & Collins* received from Messrs. *Jenkinson* a draft of the proposed underlease from *Snelling* to *John Thomas*, containing a recital of the lease to *Sowman*, and a covenant on the part of the lessee not to carry on, or permit to be carried on, upon the two houses the trade or business of a grocer or cheesemonger without the lessor's consent. Messrs. *Bridger & Collins*, on the 18th of November, struck out the covenant and returned the draft, observing that they had altered it "in strict accordance with the agreement, and with the lease of the 14th of July, 1823. We return it without prejudice to the question as to Mr. *Sowman's* lease." Messrs. *Jenkinson*, on the 21st, replied that the covenant, "though not appearing in the contract, was a matter of arrangement between Mr. *Snelling* and Mr. *Thomas* after the contract was signed, and the late Mr. *Thomas* approved of the draft lease with that covenant, and it was engrossed. Mr.

Snelling is under covenant not to allow the business of a grocer or cheesemonger in either of the five houses held by him."

On the 24th of November Messrs. *Bridger & Collins* wrote to say that their client, being merely an administrator, could not accept a lease subject to any underlease or incumbrance not appearing on the written contract, without legal evidence; that they might be disposed to waive *Sowman's* lease, but could not waive the objection to the restrictive covenant. To this Messrs. *Jenkinson* answered on the 25th of November, that the fact of Mr. *George Thomas* having died before the contract was completed would not exonerate his administrator from carrying out the express agreement which he had entered into with *Snelling*. "The contract between them was that the houses were sold, 'subject to the existing tenancies,' and previously to the contract (as Mr. *Thomas* was well aware) Mr. *Snelling* had agreed to grant to *Sowman* a lease of No. 737, at the rent of £65 a year, and no objection can now be taken that this lease has been granted. With regard to the covenant . . . the fact whether it is or not injurious and reduces the value of the lease, is immaterial, as the draft was approved of by Mr. *Thomas* in his lifetime, was engrossed, and he had made an appointment to execute it (as is proved) the day after he died."

John Thomas refused to execute the counterpart underlease, with the covenant in it; and on the 22nd of May, 1871, the bill was filed by *Snelling* against *John Thomas*.

The bill stated that after the execution of the agreement for a lease between the Plaintiff and *Sowman*, it was further agreed between them that a covenant should be inserted in *Sowman's* lease, that the lessee should not carry on, or permit to be carried on upon the premises, the business of a grocer or cheesemonger. It stated that when *George Thomas*, in June, became desirous of purchasing the Plaintiff's interest, Plaintiff told him of the agreement with *Sowman*, and of the restriction affecting both houses, and *George Thomas* requested him not to grant a lease to *Sowman* before the completion of the purchase as he, *George Thomas*, was desirous of himself granting the lease. It then stated the agreement of the 6th of July, 1870; that *George Thomas* agreed to the insertion of the covenant, and to the terms of the draft underlease; his sudden death; charged that under the

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circumstances the title was approved by *George Thomas* in his lifetime, and that the Defendant was not entitled to make any requisitions or objections in respect thereof; also that the Defendant, since *George Thomas's* death, had accepted and approved the title so far as it was affected by the restriction, and had accepted and approved the form of the underlease to be granted.

The bill prayed for specific performance of the agreement of the 6th of July, 1870, the Plaintiff submitting to perform the same so far as it was unperformed on his part; also for a declaration that *George Thomas* in his lifetime, and the Defendant since his decease, had waived their right to investigate the Plaintiff's title, and that they had accepted the title and the form of lease as engrossed; that the Defendant might be decreed to execute the counterpart, and to pay the residue of the purchase-money; with other relief.

The Defendant, by his answer, said that the statements relating to Lot 2 in the particulars of sale were made entirely from the statements of the Plaintiff's solicitors; that at the interview of the 27th of August, 1870, Mr. *W. R. Collins* distinctly asked whether there was any written agreement to grant a lease to *Sowman*, and was told there was not; that the 29th of October, 1870, was the first date at which the Defendant's solicitors had any notice or suspicion of the agreement with *Sowman;* and that not even then were they informed of its terms.

He further said, that not until the 18th of November, 1870, when the draft of the proposed underlease to the Defendant was sent, were he or his solicitors aware of the lease having been granted to *Sowman;* and that the letter of the 21st of November was the first intimation he or his solicitors ever had that there was any contract or arrangement between the Plaintiff and *George Thomas* as to the restriction.

He denied that he had adopted the contract with a full knowledge of the Plaintiff's title with reference to the restrictions; said he had always been ready and willing to specifically perform the agreement of the 6th of July, 1870, and to accept an underlease according to its terms; that the insertion of such a covenant was unusual, and would depreciate the property; and claimed the benefit of the *Statute of Frauds.*

The Plaintiff, by his affidavit, described the negotiations with *George Thomas* as being conducted on the express understanding that the trade of a grocer and cheesemonger could not be carried on in any of the houses except *Carter's*. He said that on the 6th of July, 1870, he met Mr. *Thomas* by appointment at Messrs. *Jenkinsons'* office, and they mutually gave instructions to Mr. *Atchley*, the clerk, to draw up the agreement. He said, "I do not think the special restriction as to the trades . . . was mentioned to Mr. *Atchley* as part of the instructions to him for the purpose of drawing up the said agreement, but I positively state that it was most distinctly understood between the Plaintiff and myself . . . that such special restrictions should be inserted."

Mr. *Atchley* said that Mr. *Thomas* was very anxious to have the agreement prepared at once, as he desired to shew it to the solicitor of a building society of which he was a member. To the best of his recollection nothing whatever was said at this interview either by the Plaintiff or Mr. *Thomas* as to any restrictions about letting the houses. He then deposed as above stated.

Mr. *W. R. Collins'* impression, that at the interview of the 27th of August he was informed that there was no existing agreement with *Sowman*, was wholly contradicted by Mr. *Atchley*.

Mr. *Rice*, a surveyor, deposed that the restriction would depreciate the property to the amount of £250.

Mr. *Eddis*, Q.C., and Mr. *Decimus Sturges*, for the Plaintiff:—

The property was sold to *George Thomas*, "subject to the existing tenancies." He knew of the terms on which the property was agreed to be let to *Sowman* and *Carter*. There can be no doubt of this, for an underlease, having in it this restrictive covenant, was drafted and brought to his attention; he agreed to enter into the covenant; the engrossment was prepared, and he was to have executed it next day, but died the same evening. The Defendant adopts the contract, and puts the property up for sale, stating the fact of the underlease having been prepared and engrossed, "in pursuance of the agreement," and offering it for inspection. What is that but adoption?

We do not ask the Court to enforce specific performance of a contract with a parol variation; but we say that parol evidence is

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admissible to explain the subject-matter of the agreement: *Ogilvie* v. *Foljambe* (1). We do not wish to vary the terms, only to explain them.

Supposing the contract with *George Thomas* to have been perfectly open, if he was acquainted with the fact of the existence of an incumbrance, he was bound. Here there is evidence of knowledge having been brought to *George Thomas* personally. He saw the draft underlease, which gave notice of the restriction: *Smith* v. *Capron* (2). "He had notice, and it is not necessary to put it on contract": *McMurray* v. *Spicer* (3).

If *George Thomas* were now alive, and were to admit the parol variation, and his assent to the underlease as engrossed, would the Court allow him afterwards to shift his position, and repudiate his agreement? *George Thomas* was not a lawyer, and probably was not alive to the necessity of mentioning the matter at the time to Mr. *Atchley;* but he was a grocer, and therefore likely to be on his guard with the Plaintiff.

Mr. *Kay*, Q.C., and Mr. *W. Pearson*, for the Defendant:—

We rely on the statute. Neither the administrator nor any one else had any inkling of this alleged secret term of the agreement. How can a man in the position of a fiduciary depart from a written agreement, unless there is legal evidence of some term which is binding on him under the statute? This claim is a specimen of the very evil and mischief which the *Statute of Frauds* was passed to prevent.

Van v. *Corpe* (4) shews that "usual" covenants do not include a covenant in restraint of trade; also that an agreement for a lease cannot be specifically performed with a variation: *Jordan* v. *Sawkins* (5); *Nurse* v. *Lord Seymour* (6); *Sugden's* Vendors and Purchasers (7).

It is not as though no mention of covenants was made in the contract: it was stipulated that the covenants were to correspond with those of the original lease. Until the terms of the lease to

(1) 3 Mer. 53.
(2) 7 Hare, 185, 189.
(3) Law Rep. 5 Eq. 527, 541.
(4) 3 My. & K. 269.
(5) 1 Ves. 402.
(6) 13 Beav. 254, 269.
(7) 14th Ed. p. 165.

Sowman, and of the alleged agreement between the Plaintiff and *Sowman*, became known to the Defendant's solicitors, for aught they knew, the restrictive covenant in the underlease (produced on the 17th of August) was in conformity with a covenant to the same effect in the original lease. They did not see *Sowman's* lease till the 18th of November. The Plaintiff tries to impose upon us other and different covenants. No doubt a man may by parol waive something which the law would otherwise give him; as, for example, a right to see the lessor's title, as in *Ogilvie* v. *Foljambe* (1); but in the present case there was no waiver; there was simply ignorance on the part of the Defendant's solicitors.

Mr. *Eddis*, in reply:—

We do not rely upon constructive notice; the question is, what was the contract? The proof of what it was does not rest upon the evidence of Mr. *Snelling* alone; there is also that of Mr. *Atchley*. There is also the strong presumption arising from all the surrounding circumstances. There can be no doubt that *Snelling* was bound to *Sowman*, and if so, the Defendant is equally bound: *Tulk* v. *Moxhay* (2); *Wilson* v. *Hart* (3).

Mr. *Kay*, in reply on *Wilson* v. *Hart*.

SIR JAMES BACON, V.C.:—

This case has occupied a long time in discussion, but the point of the defence is a very simple one, namely, the *Statute of Frauds*. The Plaintiff has to make out that the statute does not apply.

The Plaintiff's statement (and his affidavit is the only evidence in support of that statement), is that, upon the occasion of the interview for the purchase, he explained to the intending purchaser that there were certain restrictive engagements or covenants which would be binding on the purchaser, if and when his purchase should be completed. That rests entirely and solely on the statement of the Plaintiff himself.

Now the transaction proceeds thus:—The parties go to a solicitor, they state to him the terms of their contract, he reduces it into writing, and he states in evidence—what is in general quite con-

(1) 3 Mer. 53. (2) 2 Ph. 774. (3) Law Rep. 1 Ch. 463.

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sistent with the statement of the Plaintiff—that there was not one word mentioned in his presence, at the time when he performed his office, about the restrictive covenant. So that I am quite justified in saying that the alleged acceptance of such a covenant rests on the Plaintiff's evidence alone; for to carry on Mr. *Atchley's* version, what he further states is, that, after that agreement in writing had been signed by the parties, and he had had instructions to prepare the lease which was to be executed in consequence of them, the Plaintiff came to him and informed him that he and *George Thomas* had agreed about the restrictive covenant. That does not carry it any further. The Plaintiff does not suggest or assign any other time when the agreement was come to than the 6th of July, the date of the original treaty. He does not say that any subsequent agreement was made, but the evidence of *Atchley* is, that the Plaintiff informed him of the particular stipulation, but did not say anything as to a restrictive covenant being part of the contract. The Plaintiff does not say that it was forgotten when he was before *Atchley*. He does not assign any reason why it was not inserted as a part of the agreement; but *Atchley* says that on communication afterwards had with *George Thomas*, and on his (*Atchley's*) information, *George Thomas* said, "Yes, that is the arrangement we have come to." Mr. *Atchley's* statement is nothing one way or the other. It is quite consistent with the facts as he states them, that, after the parties had been before the solicitor's clerk and had signed the agreement, they bethought themselves that there was to be that restrictive covenant, and that *George Thomas* said so. When at a later period the draft was read over to him, he said, "Oh, is that it?" when they came to the restrictive covenant. But that is not the agreement. It is an inference which *George Thomas*, if he were now alive, might probably draw. Looking at this case in the same aspect as if *George Thomas* were now alive, he might have said, "Yes, after the agreement was come to, the Plaintiff told me that he was bound by these covenants, and I did say I did not care for that, and I completed the purchase; but I have changed my mind." That would be *nudum pactum*, and the statute clearly applies. Now this is, to my mind, a conclusive answer to the case, there being nothing but the Plaintiff's statement; because from the observations I

have made it will appear that I attach no importance to what Mr. *Atchley* says. Taking it exactly as he says, it is of no weight to determine the question which is raised. There is but one fact material, and that fact is this, that there is a written agreement, clear, distinct, and express in its terms, and then the Plaintiff says, "You must add to that agreement another stipulation of a character very onerous to you, the purchaser, for my benefit and advantage, and I ask you to add it, because I say that that arrangement was come to between us." A case more clearly within the *Statute of Frauds* cannot be stated. Anything more dangerous than to permit a legal or equitable right to be established on such evidence cannot be conceived, when, after the sudden death of *Thomas*, no one remains who can throw any particular light upon the subject of these negotiations between the parties. The draft is prepared, and in consequence of instructions it is communicated to Mr. *Collins*. The agreement shews on the face of it that the lease is to contain the covenants contained in the original lease, and I must say that, in my judgment, it was to contain no other conditions. It naturally follows that, if two persons having a derivative title under a lease agree that they shall retain it as under the original lease, they retain it under the stipulations contained in that lease, and no others. As there is nothing to lead to any other conclusion, in my opinion it was agreed that the lease should contain those covenants and no others.

Then it is said that he takes it subject to the existing tenancies. The words of the agreement in that respect, I think, are sufficiently explicit: "On such completion the purchaser shall have possession of the premises, and from that day be entitled to the rents and profits, subject to the existing tenancies." That is simply a qualification of the right which the agreement proposes to transfer to the purchaser—a qualification of his interest in the rents and profits, and of the fact that he shall have possession. He shall not receive the rents, or have possession of the premises, otherwise than subject to the existing tenancies. The "existing tenancies" was a thing that was obvious enough, and about which the purchaser did not care a straw. He saw *Carter* in possession of one of these houses. When I say "these houses," I mean the

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six. *Carter* was in possession of one, and *Sowman* in possession of another. What did it concern the purchaser what the tenancy of *Carter* was? and as to *Sowman*, he had entered, and it is certain that at that time there was no binding agreement as to a restrictive covenant between *Sowman* and the Plaintiff. In my opinion it would be a great hardship on *George Thomas*, if he were now alive, under these circumstances to say that he was bound to accept a lease with these restrictive covenants; and it would be a much greater hardship, and directly against the law, to say that his legal personal representative, who is bound to carry out his intestate's contract, and who is bound not to add anything to that contract, nor to burthen the estate with anything which the estate was not burthened with in the intestate's lifetime, must accept such a lease.

The answer founded upon the *Statute of Frauds* seems to me to be clearly made out, and I cannot treat this stipulation about the restrictive covenants otherwise than as a distinct and collateral agreement, which differs entirely from the subject-matter and the tenor of the writing, and which would throw upon the purchaser a burthen of no inconsiderable amount, for it appears from the evidence that to agree to be bound by these covenants would be to diminish the value of the property by £250. That is not a sum which is lightly to be taken out of this testator's estate. In my opinion, therefore, the evidence clearly establishes, according to the Plaintiff's own shewing, that an agreement not reduced into writing subsisted between him and *George Thomas*, and that there has been no act of part performance, and no recognition. The transaction of the sale does not in the slightest degree confirm the Plaintiff's view, but it is consistent with all that the Defendant now says. He is, under the agreement, bound to take a lease with the covenants contained in the original lease, and with no others. To suffer the Plaintiff—now that *George Thomas* is dead (and whether he were dead or alive it would be the same)—to establish such a case by his own evidence alone, would, in my opinion, be to encounter that very danger which the *Statute of Frauds* was designed to prevent; and, therefore, I think the Plaintiff fails in his demand to have a specific performance of any contract, other than that which the Defendant expresses his present readiness to

execute, and which he says he has always been ready to execute whenever a proper document was presented to him for that purpose.

Nobody is taken by surprise in this, for the matter was fully considered by the professional advisers on both sides. The objections taken by the Defendant are pointed out in an opinion of Mr. *George Long's* among others, and in the correspondence Mr. *Long* states fully and distinctly the only grounds on which the Defendant resists the performance of that agreement which the Plaintiff insists on, whilst he expresses his readiness to perform the agreement which alone he is bound to perform. If after all these negotiations and this careful consideration of the rights of the parties, a Plaintiff insists on making a dispute the subject of litigation in this Court, I think he must, in all reason and justice, pay the costs of it.

The following is a minute of the order:—

The Defendant having submitted by his answer specifically to perform the written agreement of the 6th of July, 1870, in the bill mentioned, and to accept an underlease in strict accordance with the terms of such agreement,

Dismiss the bill with costs.

Solicitors for the Plaintiff: Messrs. *Jenkinson, Owen, & Olivers.*
Solicitors for the Defendant: Messrs. *Bridger & Collins.*

V.-C. H.

1874

Jan. 15.

GILL *v.* DOWNING.

[1872 G. 78.]

Policy — Mortgage — Payment of Premiums by Mortgagees — Salvage — Lien — Interest.

28 CLD 554
557,560

A policy of assurance on the life of *G.*, granted to a trustee for her, was assigned to trustees, upon trust to invest the proceeds at the death of *G.* for the benefit of *C.* for life, for her separate use, without power of anticipation, and after her death upon trusts as she should appoint, and in default of appointment for the persons who would be entitled to her personal estate. The trustees had power to pay the premiums. Notice was given to the assurance company of the assignment. *C.* subsequently, by a deed to which *G.* was a party, appointed the policy and the moneys to become due thereon to the Plaintiffs to secure the repayment of moneys (with interest at 5 per cent.) advanced to *G.* for the benefit of herself and *C.* and children. Notice was given to the surviving trustee of the settlement and to the assurance company. The Plaintiffs had, in consequence of the trustee and others interested in the policy refusing to pay them, paid the premiums and kept the policy on foot. On the death of *G.* the assurance company paid the policy moneys to the trustees, who refused to pay the Plaintiffs the sums due to them. The policy moneys were afterwards paid into Court.

On bill filed by the Plaintiffs:—

Held, that they were entitled to be repaid at once the moneys which they had advanced for the payment of the premiums with interest at 4 per cent., and 1 per cent. more on the death of *C.*

By a settlement in December, 1847, on the marriage of the Defendant *Cardwell Chetham* and the Defendant *Eliza Jess Chetham* (formerly *E. J. Kerr*), to which her mother, *Elizabeth Greaves*, was a party, the husband, *C. Chetham*, assigned to the Defendant *Downing* and another trustee (now deceased) all his interests under the will of his grandfather, *Henry Cardwell*, upon trust, after the death of his mother, or sooner with her consent, to convert the same into money, and to invest the proceeds and to pay the income to the Defendant *E. J. Chetham* during her life for her sole and separate use, and without power of anticipation, and after her decease in trust to hold the capital and income as she should by deed or will appoint, and in default of appointment in trust for the person or persons (including any husband of Mrs. *Chetham*) who would be entitled to her personal estate at her decease in case she

died intestate. *E. J. Chetham* and *Elizabeth Greaves* assigned unto the same trustees, their executors, &c., a policy of assurance on the life of *E. Greaves* granted by the *Argus Life Assurance Company* to *E. J. Chetham* (who was in fact, and was therein stated to be, a trustee for *E. Greaves*), dated the 2nd of August, 1843, for the sum of £499, subject to the payment of an annual premium of £20 19*s.* 2*d.*, and the said sum of £499, and all other moneys thereby insured or to become payable by virtue of the policy. The trustees were, after the death of Mrs. *Greaves*, to get in the policy moneys, and to invest and hold the same upon trusts similar to those above set forth. *Cardwell Chetham* covenanted with the trustees to pay the annual premiums, to keep the policy on foot, and not to do anything whereby the policy might become void; and it was declared that the trustees might, if they should think fit, apply any part of the income, or, if that should be insufficient, any part of the capital of the trust property, in payment of the premiums. Notice of the assignment of the policy by that deed was immediately given to the assurance company. By an indenture dated the 31st of October, 1866, between Mrs. *Chetham*, Mrs. *Greaves*, and the Plaintiffs, which recited the settlement of 1847; that the Plaintiff *Gill* had advanced Mrs. *Greaves* moneys on the security of her promissory note, and, as was intended, on the collateral security of Mrs. *Chetham*, under the power of appointment in the settlement (which, with the policy, was left with the Plaintiff *Gill*) that the Plaintiff *Gill* had advanced other moneys on the like security; that the Plaintiff *Wilkinson* had advanced moneys to Mrs. *Greaves*, with interest at 5 per cent., Mrs. *Chetham* having agreed to secure the repayment of the same by an assignment of the policy, and Mrs. *Greaves* having given a bond for the same; that the Plaintiff had paid one half-yearly premium on the policy, and that all the moneys advanced (in the aggregate £509 4*s.* 7*d.*) were owing; Mrs. *Chetham* appointed that the policy and the moneys to become due by virtue thereof should be held by the trustees of the settlement for the benefit of the Plaintiffs *Gill* and *Wilkinson*, their executors, &c.; that the Plaintiffs should be paid by the trustees any sum which they or either of them had advanced for the payment of the premiums, with interest at 5 per cent. and expenses, and also the principal moneys and

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interest owing to them. The deed contained a power of sale enabling the Plaintiffs or the survivor to sell the policy. Notice of the deed of October, 1866, was given to the surviving trustee of the settlement of 1847, and to the assurance company. In 1853 Mr. *Chetham* deserted his wife and children. The husband and wife had ever since lived separate, and the wife and children, after such separation, lived with, and were almost entirely supported by, Mrs. *Greaves*, to whom, in fact, the Plaintiffs advanced their moneys, at the request of Mrs. *Chetham*, for the use of both Mrs. *Chetham* and Mrs. *Greaves*. Mrs. *Greaves*, in December, 1866, executed a deed of composition, and agreed to pay her creditors 2*s.* 6*d.* in the pound. The Plaintiffs received in the aggregate about £80. That deed provided that the payments made to the creditors should be without prejudice to any securities held by them in respect of their debts. From August, 1866, to February, 1871, Mr. and Mrs. *Chetham*, and the Defendant *Downing*, the surviving trustee of the settlement of 1847, refused to pay the half-yearly premiums which became due during that period, and the Plaintiffs paid them—in the aggregate £104 15*s.* 10*d.* Mrs. *Greaves* died in June, 1871, insolvent. The assurance company paid the policy moneys to the Defendant *Downing*, and he having refused to pay the Plaintiffs the sums due to them on the mortgage security, and the sum for keeping the policy on foot, the Plaintiffs filed this bill, and, after alleging that by paying the premiums they prevented the entire forfeiture of the policy and preserved the moneys assured for the benefit of all the parties interested under the settlement, and submitting that they were entitled to be repaid the sums advanced by them, with interest at 5 per cent., prayed in effect for an account, and for a declaration that they were entitled to be repaid out of the policy moneys the sums that might be found due, with interest at 5 per cent. from the dates when the premiums were paid. The Plaintiffs also prayed that the balance of the policy moneys might be invested for the benefit of themselves and the other persons interested under the trusts of the settlement of 1847, and that the costs of the suit might be provided for. The moneys had been paid into Court.

Mr. *Dickinson*, Q.C., and Mr. *Jolliffe*, for the Plaintiffs, after

stating the facts, contended that they ought, considering the decision in *Shearman* v. *British Empire Mutual Life Assurance Company* (1), where the legal personal representative of a mortgagor who had deposited a policy on his life, and who, after being adjudicated a bankrupt, and thereby relieved from the obligation, yet continued to pay the premiums till his death, some years afterwards, was held to be entitled to be paid the premiums with 4 per cent., to be repaid the sums which they had advanced in the nature of salvage moneys. They admitted that they could not ask that more than 4 per cent. interest should be paid at present to the Plaintiffs.

Mr. *J. T. Prior*, for Mrs. *Chetham*, after referring to the cases of *Burridge* v. *Row* (2), where it was held that without any contract the mere fact of making payments of premiums, however necessary that might be for the preservation of the property, would not give the party making them any title to the property; and *Clack* v. *Holland* (3), which shewed that a trustee, having a duty to perform to keep up a policy, and the means of procuring funds for that purpose, could himself acquire no lien on the policy for premiums paid out of his own moneys, but that if he had no funds properly applicable for keeping up the policy, he might advance moneys for the premiums, and for them would have a lien on the policy; admitted that the Plaintiffs had preserved the policy from forfeiture, but contended that their interest was, under the settlement, in reversion only expectant on the death of Mrs. *Chetham;* that she had a life interest to her separate use, without power of anticipation, in the income of the trust fund; that the Plaintiffs had paid the premiums voluntarily and not at her request; and that the moneys paid, and interest, which should be only at the rate of 4 per cent., ought, if at all, to be added to the moneys owing on the mortgage, and not paid until after her death. He also submitted that the bill ought to be dismissed as against Mrs. *Chetham*, and the Plaintiffs ordered to pay her costs of the suit.

Mr. *Lindley*, Q.C., and Mr. *Whitehead*, were for the trustee.

No one appeared for Mr. *Chetham*.

(1) Law Rep. 14 Eq. 4. (2) 1 Y. & C. Ch. 183. (3) 19 Beav. 262. 18 Jun 1007

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Mr. *Dickinson*, in reply, contended that the principle of the decision in *Burridge* v. *Row* (1) was, that no person should enjoy the payments of another without first repaying the sums advanced. The Plaintiffs had preserved the policy, and they were entitled to be immediately repaid the premiums, and ought not to be kept out of their moneys during the life of Mrs. *Chetham*.

SIR CHARLES HALL, V.C.:—

I am of opinion that the Plaintiffs who paid the premiums must be repaid them, though they acquired no property in the policy. There are in the deed, which provides for the payment of the policy moneys, no clauses that exclude the equitable right of the Plaintiffs, and therefore I hold that they are entitled to be paid at once the sums which they have advanced for keeping the policy on foot, with interest at 4 per cent., and that they are also entitled to a charge for the extra £1 per cent. upon the reversion of the fund as provided by the mortgage deed. The fund must remain in Court until the death of Mrs. *Chetham*, when it will be payable to those interested in it.

Solicitors: Messrs. *Bower & Cotton*, agents for Messrs. *Gill, Radford, & Gill, Manchester ;* Mr. *G. J. Brownlow*, agent for Mr. *Richard Brown, Stockport.*

V.-C. H. 1874 *Jan.* 15.

CURNICK *v.* TUCKER.

[1870 C. 241.]

Will—Construction—Life Interest—Precatory Trust—Power of Appointment.

18 Eq 415-7
4 Ch D 239
8 Ch D 541.
7 App Cas 314-5
330
24 Ch D 200-3

Testator appointed his wife sole executrix, and left to her all his property, landed and personal, of every description, for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children, during her lifetime and at her decease, doing equal justice to all of them:—

Held, that the wife took a life interest, with a power of appointment amongst the children as she might think fit.

JOHN TUCKER, who died on the 7th of December, 1866, by his will, made on the 4th of that month, said: "I hereby appoint

(1) 1 Y. & C. Ch. 183.

my dear wife, *Elizabeth Tucker*, sole executrix, to whom I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them."

The testator left seven children, all of whom had attained twenty-one years of age. His estate, real and personal, was, at the time of his death, valued at £12,000. The suit was instituted for a declaration of the rights of the parties interested in the estate, and for an administration of the trusts of the will by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Nalder*, for the Plaintiffs (three daughters of the testator and their husbands):—

The testator has, by the words which he has used, created a trust for the benefit of his wife during her life, and after her death for his children. The words "for her sole use and benefit" do not exclude a trusteeship. In *Hart* v. *Tribe* (1) the gift was to the wife for her own and the children's benefit, as she should think fit, the testator being convinced that she would dispose of the money conscientiously, and recommending her not to diminish the principal; and it was held to be a trust for the wife for life and the capital for the children. *Gully* v. *Cregoe* (2) was a stronger case than this in favour of an absolute gift to the wife, for the gift there was of residue to her for her own sole use and benefit for ever, the testator feeling assured and having every confidence that she would dispose of the same equitably amongst her two daughters and their children; but the decision was that she took only a life interest, with a power of appointment. The words used by the testator in *Shovelton* v. *Shovelton* (3) were very similar, and it was held that the wife took only a life interest. The case of *Ware* v. *Mallard* (4) was, perhaps, more like the present than any other. The gift was to a wife, her heirs, executors, administrators, and assigns, to and for her sole use and benefit, in full confidence that she would in

(1) 18 Beav. 215.
(2) 24 Ibid. 185.
(3) 32 Beav. 143.
(4) 16 Jur. 492.

V.-C. H. 1874 CURNICK v. TUCKER.

every respect appropriately apply the same for the benefit of his children; and it was held that a trust was created. It is submitted, therefore, that Mrs. *Tucker* is only entitled to a life interest.

Mr. *Greene*, Q.C., and Mr. *Busk*, for Mrs. *Tucker*:—

There is no precatory trust raised in this case, but there is a clear, express, and absolute gift to the wife, who was appointed sole executrix, of everything which the testator possessed "for her sole use and benefit," and she is entitled to dispose of it as she may think fit. This construction is supported by the decisions in *Webb* v. *Wools* (1) and *Thorp* v. *Owen* (2). In the former case there was a similar bequest, the words being for a wife's sole use, in confidence that she would dispose of it for the joint benefit of herself and her children; and the Court held that there was no precatory trust created; and in the latter, which was a case of great importance on this subject, there were trusts for maintenance, which, it is clear, may be created by precatory words. Mrs. *Tucker* being the absolute owner, it is submitted that the bill ought to be dismissed.

[They also referred to *Hawkins* on Wills (3) and the comments on the cases there cited, and to *Lambe* v. *Eames* (4).]

Mr. *H. A. Giffard* appeared for Defendants (other daughters of the testator and their husbands), but took no part in the argument; and

Mr. *Yate Lee*, for a trustee in bankruptcy.

SIR CHARLES HALL, V.C.:—

18 Eq 417

If this case had come before me after the decision of Vice-Chancellor *Kindersley* in *Webb* v. *Wools* (5), and before the decisions in the other cases referred to, I should have been disposed to hold that Mrs. *Tucker* took this property absolutely. In *Palmer* v. *Simmonds* (6), which was also before Vice-Chancellor *Kinders-*

(1) 2 Sim. (N.S.) 267.
(2) 2 Hare, 607.
(3) Page 164, *et seq.*
(4) Law Rep. 10 Eq. 267; Ibid. 6 Ch. 597.
(5) 2 Sim. (N.S.) 267.
(6) 2 Drew. 221.

ley, the gift was one of residue to the legatee, his heirs, executors, administrators, and assigns, for ever, for his own use and benefit, the testator having full confidence that, if he should die without issue, he would, after providing for his widow for her life, leave the bulk of such residue to the persons named equally; and the Vice-Chancellor expressed an opinion that, but for the uncertainty of the subject-matter of the gift, he should have considered himself bound by the authorities to hold that the legatee took only a life interest, with remainder to the children. That case is, no doubt, closely like the present, after eliminating the uncertainty of the subject-matter of the gift, that being one of the difficulties felt in that case; and I therefore think that the observations of Vice-Chancellor *Kindersley* are strongly in favour of my holding that there is a trust in this case, and that *Hart* v. *Tribe* (1), *Gully* v. *Cregoe* (2), and *Ware* v. *Mallard* (3) are authorities which support the view that a trust has been created in favour of the children. The case most like the present is *Ware* v. *Mallard*, and I do not think that the language of the codicil in that case, which was to the effect that the property given to the wife should be disposed of by her for the same intents and purposes as his other property, makes any substantial distinction. I do not think the will there is really distinguishable from the present; and therefore, in the absence of any other authority more closely applicable to the view put forth on behalf of Mrs. *Tucker*, I consider that I am not at liberty to hold otherwise than that there is a gift to her for life, with a trust imposed upon the property in favour of the children, and with a power to her of disposition between or amongst them in such shares as she may think fit. I have been referred to the case of *Lambe* v. *Eames* (4) as being in favour of my holding this to be an absolute gift to Mrs. *Tucker;* but in that case there were so many special circumstances which may account for the decision arrived at, that I do not think it can be considered an authority to govern this case, and to require me to hold that the testator meant that his wife should have liberty to give away the property from the children. I hold, therefore, that this is a gift to Mrs. *Tucker*

(1) 18 Beav. 215. (2) 24 Beav. 185. (3) 16 Jur. 492.
(4) Law Rep. 10 Eq. 267; Ibid. 6 Ch. 597.

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for life, with a power of disposition amongst her children in her lifetime, or by deed or will, as she may think fit.

Solicitors: Messrs. *Wood, Street, & Hayter*, agents for Mr. *W. Day, Devizes;* Messrs. *Park Nelson & Morgan*, agents for Messrs. *J. & G. N. Tanner, Speenhamland;* Messrs. *Venning, Robins, & Venning*, agents for Messrs. *Cobb & Smith, Salisbury;* Mr. *Brownlow.*

V.-C. H. 1874 Jan. 16.

TAYLOR *v.* TAYLOR. *In re* TAYLOR'S ESTATE ACT.

Will—Annuity—Charge—Corpus or Income—Distress and Entry—Devise in Strict Settlement—Arrears a continuing Charge on Income.

Testator gave all the residue of his real and personal estate to trustees for a term of eleven years from his decease, upon trust to pay out of the rents, interest, dividends, and proceeds, certain life annuities; and he directed that the residue of the rents, &c., should, during the term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate at the expiration of the term; and after the determination of the term he devised his real estate, subject to and charged with the payment of the annuities for the residue of the lives, with powers of distress and entry for the recovery of the same, as if the same had been secured by a lease for years, unto the trustees, in strict settlement:—

Held, that the arrears and the annuities were not charged upon the *corpus*, but upon the income, and must be paid out of the income and future income, so far as any might be required.

PETITION—FURTHER CONSIDERATION.

Joseph Taylor, who died in April, 1839, by his will, dated in 1837, after directing that all his just debts should be paid by his executors, and bequeathing certain pecuniary legacies, and making a specific devise of one of his real estates, devised and bequeathed all the residue of his real estate situate at *Hunslet* or elsewhere, and his personal estate, unto three trustees (whom he appointed executors), their heirs, executors, administrators, and assigns, for the term of eleven years, from the day of his decease, Upon trust to pay out of the rents, interest, dividends, and proceeds to arise from the said real and personal estates, the sum of £500 per annum to his wife (who died in April, 1848) for her life, if she

should so long continue his widow; the sum of £75 per annum unto and equally among his three nieces named and the survivor; and the sum of £500 per annum (in the events which had happened) to the two Petitioners, *E. H.* and *C. Wainhouse*, for their separate use during their lives and the survivor of them. The testator directed that the residue of the rents, interest, dividends, and proceeds should, during the said term of eleven years, be accumulated, in manner in the will mentioned, for the benefit of the person who should become entitled to the residue of his personal estate on the expiration of that term; and after the determination of that term, he devised all his real estate at *Hunslet* or elsewhere, subject nevertheless to and charged with the payment of the three annuities for the residue of the respective lives of the annuitants, and the lives or life of the survivors and survivor of them, with powers of distress and entry for the recovery of the said several annuities, as if the same had been respectively secured by a lease for years unto the three trustees, their heirs and assigns; to the use of his great-nephew *Joseph Taylor* and his assigns for life, with remainder to the use of trustees and their heirs to preserve contingent remainders, with remainder to the use of the said *Joseph Taylor's* first and other sons successively in tail with remainders over.

The will was proved by one executor; the other two renounced and disclaimed the trusts. In 1843 a suit was instituted for administration of the trusts, and certain proceedings, not material to be referred to, had taken place therein. Under the provisions of an Act of Parliament passed in the session of 1866, the tenant for life sold the real estate at *Hunslet* discharged of the above-mentioned estates, charges, and interests, and paid the proceeds of sale into Court to the credit of the cause—"the account of the proceeds of the sale of the *Hunslet* property"—and the same had been invested, and that estate was now represented by a sum of £12,899 6*s.* 2*d.* £3 per Cent. Consols, and a further sum of over £1000 accumulations. The annuity of the Petitioners was, down to the year 1858, paid in full, but since that period they had received less in each year than the full amount, and the arrears were now over £1300. The reason given by the tenant for life for non-payment of the full amount of the annuities, was insufficiency of annual income of the

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estate. The tenant for life of the estate and his eldest son had by deed barred the entail. The Petitioners contended that the arrears and continuing payments of their annuity were a charge upon the *corpus* and capital of the settled estates, or that they constituted a continuing charge upon the rents, profits, and annual income, and that such arrears ought to be raised and paid, and due provision made for future payment of the annuity; and prayed for an account of the arrears; for an inquiry to ascertain what property now remained charged with the arrears and continuing annuity; that the arrears might be raised and paid out of the *corpus* and capital of the property charged with the annuity; and that provision might be made for keeping down the continuing annuity out of the rents, profits, and income, or, if they should prove insufficient, out of the said *corpus* and capital. The Chief Clerk having made his certificate, shewing, *inter alia*, what the arrears amounted to, the Petition now came on to be heard upon further consideration.

Mr. *Bristowe*, Q.C., and Mr. *T. C. Wright*, for the Petitioners, contended that, upon the authorities of *Birch* v. *Sherratt* (1) and *Booth* v. *Coulton* (2), and especially having regard to the powers of distress and entry, that these annuities were a charge upon the *corpus*, and that the Petitioners were entitled to be paid all the arrears which were due to them out of the *corpus;* or, if that should not be the view of the Court, then that the arrears ought to be declared to be a continuing charge upon the income and future income, so far as it might be required.

Mr. *Lindley*, Q.C., and Mr. *W. Barber*, for Respondents, referred to *Hindle* v. *Taylor* (3), *Addecott* v. *Addecott* (4), and *Baker* v. *Baker* (5), and contended that the language of the testator clearly indicated that he did not intend to give the annuitants a charge upon the *corpus;* that the words used by the testator were far less strong than those used in *Birch* v. *Sherratt*, in which case *Hindle* v. *Taylor* was not cited; that there was not a trust here as in *Booth* v. *Coulton;* and that the remedy given to the annuitants of distress and entry was personal to them, and their only remedy.

(1) Law Rep. 2 Ch. 644.
(2) Ibid. 5 Ch. 684.
(3) 20 Beav. 109
(4) 29 Ibid. 460.
(5) 6 H. L. C. 616.

Having assumed, for the purpose of argument, that the annuities were not a charge upon the *corpus*, but upon the income, they relied upon the direction to accumulate, as shewing that they were to be paid out of the income *de anno in annum*, and that if any arrears accrued, they would not be a continuing charge upon the income after the deaths of the annuitants.

Mr. *Bristowe*, in reply, submitted that the decision in *Hindle* v. *Taylor* (1) was not reconcilable with that in *Birch* v. *Sherratt* (2); that *Baker* v. *Baker* (3) was clearly distinguishable from the present case; and after referring to *Carter* v. *Salt* (4), *Cupit* v. *Jackson* (5), and *Foster* v. *Smith* (6), contended that, taking the will as it stood, there was a clear intention on the part of the testator to charge the estates devised with the annuities, and that therefore the Petitioners were, if the annuities should not be kept down out of the income arising from the estate and the fund in Court, entitled to be paid out of the *corpus*.

SIR CHARLES HALL, V.C.:—

The question in this case is one of construction upon the will of *Joseph Taylor*. The first part of the will is a disposition by the testator to trustees for the term of eleven years after his decease; and a provision for the payment of certain annuities out of the rents, interest, dividends, and proceeds to arise from his estates. These payments are unquestionably to be made out of income for eleven years, and it is impossible to successfully argue upon the language used so far, that the annuities are a charge upon the *corpus*. The question is whether, under the subsequent disposition, the annuities or the arrears, in case of there being any, could be raised out of the *corpus* by a sale or mortgage; for the contention on the part of the Petitioners goes to that length. Considering this case free from authority, what is this disposition? It is the ordinary case of a testator devising his estate in strict settlement —to one person for life with remainders over—and saying that those persons are to take the estate subject to the payment of certain annual sums, and to the annuitants he gives powers of

(1) 20 Beav. 109
(2) Law Rep. 2 Ch. 644
(3) 6 H. L. C. 616.
(4) 1 Ir. Rep. Eq. 97.
(5) 13 Price, 721.
(6) 1 Ph. 629.

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distress and entry for the recovery of those sums as if the same had been secured by a lease for years. There is nothing in the terms of the gift which enables me to say that the annuities are charged upon the *corpus;* and taking them out of the *corpus* might lead to very considerable confusion. In the ordinary case of a strict settlement, where a jointure is provided for, it is usual to give powers of distress and entry, but the jointure is by these means to be paid out of the income of the estate, and those who allege that it is not to be paid out of income must shew that it is not to be so paid, having regard to the true construction of the will. I do not find anything in this case which shews this. The annuitants having powers of distress and entry, they could, whenever necessary, exercise those powers in reference to the sums that might be owing to them upon their making their claim. Independently of authority, that must be the true meaning of such powers, and I know of no authority which warrants the view that in exercising such powers the annuitants are limited to any particular year. One of the cases referred to in support of a charge upon the *corpus* was *Cupit* v. *Jackson* (1), but that was a very different case to this, and the question raised there was afterwards considered in the case of *Graves* v. *Hicks* (2). Under the powers of distress and entry the annuitants can enter. The effect of entry would be that the person entering would become possessed of a chattel interest, which would continue until payment of all the arrears. The declaration will be that these annuities are not a charge upon the *corpus*, but must be paid out of the income, and that the Petitioners are entitled to be paid all their arrears, and the annuities in each year as they become due, out of the income, so far as it will satisfy them, and out of future income, so far as may be required. As regards the costs of the Petition, the Petitioners are entitled to add theirs, as between solicitor and client, to the arrears to be paid out of the income, and the Respondents must have a charge for their costs upon the *corpus*. The accumulations of the fund in Court must be applied rateably between the annuitants in reduction of the arrears.

Solicitors: Messrs. *Bothamleys & Freeman;* Messrs. *Lambert, Burgin, & Petch,* agents for Mr. *H. Snowdon, Leeds.*

(1) 13 Price, 721. (2) 11 Sim. 536.

TURTON *v.* BARBER.

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1874
Jan. 22.

[1866 T. 114.]

Privilege—Bill of Costs—Matters of Fact—Ante litem motam—Practice.

A claimant, who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked on cross-examination, whether the obstacles were suggested by him to his solicitor, or by his solicitor to him:—

Held, not bound to answer, though the communication was before any litigation was in contemplation.

The bill of costs delivered in the same matter also held to be privileged.

JOSEPH HINCKS, the testator in the cause, was the owner of certain mines in the county of *Stafford*, called the *Stowheath* and *Prebendal* mines (part of which was copyhold), and in 1864 negotiations were opened between him and Mr. *Matthew Tildesley*, of the firm of *Harper & Tildesley*, for the lease of these two mines. Adjoining them was a mine called *Barcroft*, belonging to a third person, which it was desirable to acquire in order to work the *Stowheath* and *Prebendal* mines. In October, 1864, a preliminary agreement was entered into between the parties for one lease of the *Stowheath* and *Prebendal* mines, but some difficulties having arisen, a lease of the *Stowheath Mine* only was granted in June, 1865, and an agreement for the lease of the *Prebendal Mine* executed. The lessees, *Tildesley & Harper*, proceeded to make arrangements for working the two mines together, and in so doing expended, as they alleged, large sums in machinery and other requisites. In 1865 the testator died, and it was ultimately found impracticable to grant a lease of the *Prebendal Mine*. A bill was subsequently filed to administer the testator's estate, and Messrs. *Tildesley & Harper* made a claim for the damages they had sustained by reason of the non-performance of the agreement to grant a lease of the *Prebendal Mine*, on the faith of which, as they alleged, they had expended large sums of money to no purpose.

Mr. *Tildesley*, in prosecution of the claim, made three affidavits in the suit, whereupon the Plaintiff served him with notice to attend before Mr. *Francis Bacon*, the Special Examiner, on the 9th of January, 1874, for the purpose of being cross-examined, and to

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bring with him the bill of costs delivered by his solicitor in the matter of the lease. In the 4th paragraph of his first affidavit Mr. *Tildesley* deposed as follows:—

"My negotiations with *Hincks* resulted, in about the month of October, 1864, in a preliminary agreement for one entire lease of the said *Stowheath* and *Prebendal* mines, but in consequence of obstacles as to the *Prebendal Mine*, the contract was subsequently severed."

Mr. *Tildesley* attended on the day specified, and then deposed as follows:—

"I first instructed Mr. *Gough*, as my solicitor, to take steps in regard to the leases of the *Stowheath* and *Prebendal* mines immediately after we entered into the preliminary agreement dated 15th December, 1864. I consulted no lawyer about that preliminary agreement. I am not aware of any discussion that had taken place between myself and Mr. *Gough* in relation to that preliminary agreement. And I do not know to what the first item on Mr. *Gough's* bill of costs, incurred in the preparation of the lease, refers. I have received from Mr. *Gough* a bill of costs incurred in the preparation of the lease. I have that bill of costs, and I have paid it."

The bill of costs was then called for, but the witness refused to produce it. Mr. *Tildesley* was then asked the following question:—

"Were the obstacles alluded to by you in the 4th paragraph of your first affidavit suggested by Mr. *Gough* to you, or by you to Mr. *Gough*?"

This question also the witness refused to answer, on the ground that what passed between him and his solicitor was privileged.

The Plaintiff thereupon served this notice of motion upon the witness that he should attend in Court and answer the question, and produce the said bill of costs, and pay the costs of the appeal.

Mr. *Digby Seymour*, Q.C., and Mr. *W. W. Karslake*, for the motion:—

It is not proposed to ask the witness anything but as to matters of fact occurring before there was prospect of litigation, and these he is bound to disclose. Mr. *Pitt Taylor* (1) thus defines the rule:

(1) Vol. i. p. 833, § 855.

"The legal adviser must also disclose all questions put to him by his client, together with his answers thereto, provided such questions were asked in order to gain information respecting matters as distinguished from questions put with a view of obtaining legal advice;" and the cases of *Sawyer* v. *Birchmore* (1) and *Desborough* v. *Rawlins* (2) were cited. The same principle was laid down in *Lord Walsingham* v. *Goodricke* (3). Here we only ask as to the matters of fact stated by the client to the solicitor, or by the solicitor to the client.

The VICE-CHANCELLOR:—The law has altered materially since those decisions, and is very clearly stated by Lord *Selborne* in *Minet* v. *Morgan* (4).

Mr. *Powell*, Q.C., and Mr. *Grosvenor Woods*, for the claimants, referred to *Pearse* v. *Pearse* (5), as shewing that communications made without prospect of litigation between a client and his solicitor were privileged even before *Minet* v. *Morgan*.

SIR CHARLES HALL, V.C.:—

I am of opinion that this question cannot be put. The case of *Minet* v. *Morgan* has removed any doubt that might have existed on the subject. There is no longer any distinction between communications made between a solicitor and his client with a view to litigation and simply before litigation. Both alike, if confidential communications, are privileged. Lord *Selborne*, in *Minet* v. *Morgan* (6), states what the law now is.

As to the bill of costs, that also is, in my opinion, privileged. The only object that could be in view in obtaining production of the document would be to get in the thin edge of the wedge, and so entangle the witness in the difficulty of answering other questions. A solicitor's making an affidavit as to documents is no waiver of privilege.

Solicitors for the Plaintiffs: Mr. *Hemsley*, agent for Messrs. *Deakin & Dent, Wolverhampton.*

Solicitors for the Claimants: Messrs. *Bellamy, Strong, & Edgelow.*

(1) 3 My. & K. 572.
(2) 3 My. & Cr. 515.
(3) 3 Hare, 122.
(4) Law Rep. 8 Ch. 361.
(5) 1 De G. & Sm. 12.
(6) Law Rep. 8 Ch. 366, 367.

C. J. B.

1873

Dec. 15.

Ex parte KING. *In re* HARPER.

Composition—Failure of Debtor to pay—Action by Creditor—Injunction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

2 Ch D. 66
2 Ch D. 281

The creditors of two debtors who filed a liquidation petition resolved to accept a composition payable in three instalments, respectively at six, twelve, and eighteen months after the registration of the resolution. The amount of the debt due to one of the creditors was disputed. The first instalment was paid to him upon the sum for which he claimed, and it was agreed that the true amount of his debt should be determined by the Registrar. The creditor did not take any steps to have this amount determined until after the 1st of February, 1873, when the third instalment fell due. The amount of the debt was determined by the Court on the 29th of July, 1873. Some discussion then took place between the solicitors of the parties as to the terms in which the order was to be drawn up, and ultimately, on the 19th of August, the creditor's solicitor wrote a letter assenting to the order as drawn by the debtor's solicitors, in which letter he said: "When the order is signed I shall be glad to know if you are prepared to pay the amount of the composition." The order was signed by the Registrar on the 27th of August. On the 22nd of August the debtors proposed to the creditor that they should pay the balance of the composition due to him, not in cash, but partly in bills and partly in cash. The next day the creditor declined this proposal, and on the 25th made a demand for the full amount of the debt. On the 27th of August the debtors tendered to the creditor the balance of the composition in cash, but he refused to receive it, and on the 29th of August he commenced an action to recover the balance of his debt, after deducting the first instalment which he had received:—

Held (affirming the decision of the County Court Judge), that it would be inequitable to allow the creditor to proceed with his action, and that he must be restrained from doing so.

THIS was an appeal from a decision of the Judge of the *Walsall* County Court.

On the 15th of May, 1871, *Harper & Co.* filed a liquidation petition in the County Court at *Walsall*. The first meeting of the creditors was held on the 29th of June, at which resolutions were duly passed by a statutory majority accepting a composition of 5*s.* in the pound, payable by three instalments of 1*s.* 8*d.* each, respectively at six, twelve, and eighteen months after the registration of the resolutions. The resolutions were duly confirmed on the 13th of July, and were registered on the 1st of August, 1871. One of the creditors, named *King*, was present at the first meeting,

and voted for the resolutions. In the statement of their affairs originally made out by the debtors his name was inserted as a creditor for £1792 14*s.* 9*d.*, but the word "disputed" was set against the debt. In the statement of affairs produced at the first meeting *King* was entered as a creditor for the same amount, but the word "claim" was added. At the first meeting *King* tendered a proof for £2657 7*s.* At the foot of this proof the chairman of the meeting added a note: "Exhibited 29th June, 1871, and admitted subject to further investigation." Subsequently *King* tendered a proof for £2721 18*s.* 11*d.* and a claim for £110 19*s.* 5*d.*, and ultimately the original proof for £2657 7*s.* was expunged by leave of the Court, and the fresh proof and claim were filed in substitution. *King's* debt arose in this way: He had carried on business in *London* in partnership with the debtors, this being a distinct business from that which they carried on within the district of the County Court. This partnership was dissolved on the 14th of February, 1871, by an agreement which provided that *King* was to take all the assets and discharge all the liabilities of the partnership, and that, if the assets were insufficient to meet the liabilities, the debtors were to pay *King* a moiety of the deficiency. Under this agreement *King* took exclusive possession of all the assets and of the books of accounts and vouchers of the firm. There proved to be a deficiency, but at the time when the debtors filed their petition the amount of the deficiency had not been ascertained. The first instalment of the composition became payable on the 1st of February, 1872. The amount due to *King* not having been adjusted, an arrangement was come to between him and the debtors on the 31st of January, 1872, to the following effect, viz., that they should pay him £226 16*s.* 7*d.*, being the amount of the first instalment on his proof for £2721 18*s.* 11*d.*, without prejudice to an investigation of the accounts and transactions on which the proof was based, and that, in the event of the proof being reduced, the amount paid in excess should, at the option of the debtors, be either repaid to them or be retained by *King* in part payment of the second instalment. The £226 16*s.* 7*d.* was accordingly paid by the debtors to *King*, and he gave them a receipt for it embodying the terms of the arrangement. The debtors' solicitors proposed that the amount for which *King* was

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entitled to prove should be determined by an accountant to be agreed upon. *King's* solicitors, however, by a letter of the 31st of January, 1872, required that the amount should be decided by the Registrar in Bankruptcy, and proposed in effect that the books, vouchers, and accounts relating to the proof should be investigated by the debtors or their accountants, and that, if after investigation any part of the proof should be rejected, *King* should apply to the Court to sustain his proof. This proposal was acceded to by the debtors, and a partial investigation was made by them. Some correspondence passed, and an attempt was made to settle the matter. This failed, and on the 3rd of June, 1872, the debtors rejected the proof *in toto*. *King*, however, did not then take any steps to sustain his proof. The second instalment of the composition became payable on the 1st of August, 1872, but the debtors made no further payment to *King*. On the 25th of November, 1872, he applied to the County Court by motion to enforce the provisions of the composition as upon £2721 18*s.* 11*d.*, the amount of his proof. The Judge thought the application premature, and directed the motion to stand over generally, with liberty to apply. He intimated at the same time that he thought the debtors had not sufficiently stated their grounds of objection to *King's* proof. On the 30th of November, 1872, the debtors stated their objections to *King's* proof in writing. No step was, however, taken by him to sustain the proof until after the 1st of February, 1873, when the third instalment of the composition became payable. On the 18th of March, 1873, *King's* solicitor served upon the debtors notice of an application to the Registrar to investigate his proof for £2721 18*s.* 11*d.* and his claim for £86 18*s.* 8*d.*, to which sum the original claim for £110 19*s.* 5*d.* was then reduced. The Registrar reduced the proof to £2265 11*s.* 5*d.*, and the claim to £50 1*s.* 6*d.* The debtors appealed to the Judge, and ultimately, on the 29th of July, 1873, the proof and claim were finally adjusted at £2205 13*s.* 4*d.*, making the total amount of composition payable to *King* £551 8*s.* 6*d.*, and the balance then payable (after allowing for the £226 16*s.* 7*d.* paid on the 31st of January, 1872), £324 11*s.* 11*d.* *King* on this occasion applied for interest on the balance, but the Judge held that he had no power to award interest. He also held that, as the proof was reduced, *King* was

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not entitled to costs. The Judge also ordered that each party should bear his own costs of the motion of the 25th of November, 1872.

It was arranged between the debtors' solicitors and *King's* solicitors that the former should prepare the draft order of the 29th of July, 1873, and send it to the latter. The draft order was sent to *King's* solicitors on the same day, with a letter in which the debtors' solicitors applied for half the costs of the shorthand writer's notes of some *vivâ voce* evidence taken before the Judge. On the 14th of August *King's* solicitors returned the draft order, altered by the omission of a direction that each party should bear his own costs of the proceedings. On the same day the debtors' solicitors wrote to *King's* solicitors, saying that they must insist on the direction as to costs standing, and they again inquired as to the cost of the shorthand writer's notes. On the 19th of August *King's* solicitors replied, assenting to the draft order as originally drawn, and agreeing to pay half the cost of the shorthand notes, and that the amount should be deducted from the composition. That letter contained the following passage: "When the order is signed, I shall be glad to know if you are prepared to pay the amount of the composition." There was some delay in leaving the draft order so agreed upon in the Registrar's office, owing to the absence of the managing clerk of the debtors' solicitors, and to their requiring that the order should be signed by the Registrar, who was then absent on his vacation, instead of by the Deputy Registrar. The order of the 29th of July was, however, ultimately drawn up and signed by the Registrar on the 27th of August, 1873. On the same day the sum of £320 7*s.* 3*d.* (being the balance of the composition, less a moiety of the costs of the shorthand writer's notes) was tendered to *King's* solicitors, after an ineffectual attempt to find *King* himself and tender the amount to him personally. This tender was rejected, and on the 29th of August *King* commenced an action to recover the sum of £1979 13*s.* 4*d.*, which sum was apparently intended to represent the difference between £2205 13*s.* 4*d.* (the amount of the proof and claim as finally settled) and £226 16*s.* 7*d.*, the instalment of the composition paid on the 31st of January, 1872. The circumstances which led to the rejection of the tender were these. It was inconvenient to the

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debtors to pay the £320 7*s.* 3*d.* in cash down, and a Mr. *Barker*, on their behalf, had an interview with *King* on the 22nd of August, and proposed that the balance of the composition should be paid as follows: By a bill for £100 at two months, by another bill for £100 at four months, with interest at 5 per cent., and the balance by cash down. On the following day *King* wrote to *Barker* a letter, stating that he had seen his solicitors, and that he begged to decline *Barker's* proposition as to the mode of payment. On the 23rd of August *King's* solicitors wrote to the debtors' solicitors a letter, in which, after referring to the proposed mode of payment, they said, "The composition not having been paid or tendered in manner provided for by the resolution, our client intends to proceed for the full amount of his debt." On the 25th of August the debtors were served with a demand in Bankruptcy for £2190 1*s.* 6*d.*, stated to be due and owing under an order of the Court of Bankruptcy dated the 29th of July, 1873. The tender of £320 7*s.* 3*d.* was then made on the 27th of August, 1873, and rejected.

The debtors stated that they had placed the balance of the composition in the hands of their solicitors, ready to be paid over to *King* as soon as the order of the 29th of July, 1873, was signed. The Judge came to the conclusion, on the evidence, that the money was not handed to the debtors' solicitors until the 26th of August, at the earliest.

The debtors applied to the Judge for an injunction to restrain *King* from prosecuting his action. The injunction was granted, and *King* appealed (1).

(1) 1873. Oct. 27.

THE COUNTY COURT JUDGE (Mr. *A. Martineau*), in giving judgment, after stating the facts, said:—

The law bearing on the question before me is to be collected from the cases of *Edwards* v. *Coombe* (Law Rep. 7 C. P. 519); *In re Hatton* (Law Rep. 7 Ch. 723); *In re Bishop* (Law Rep. 8 Ch. 595); *Ex parte Peacock* (Law Rep. 8 Ch. 682); *In re Thorpe* (Law Rep. 8 Ch. 743); *Slater* v. *Jones* (Law Rep. 8 Ex. 186). The result of those cases appears to me to be this—(1.) The Court of Bankruptcy has jurisdiction, after resolutions for composition have been passed, to restrain a particular creditor from maintaining an action against the debtor for a debt which is included in the composition. (2.) A creditor will be restrained from proceeding at law in order to try the validity of the resolutions generally on grounds applicable to all the creditors. (3.) A creditor will not, as a general rule, be restrained when he objects to

Mr. *G. W. Lawrance*, and Mr. *E. Pollock*, for the Appellant, contened that he had a right to go on with his action, citing *In re Hatton* (1); *In re Bishop* (2); *In re Thorpe* (3).

be bound by the composition on grounds personal to himself and not applicable to the rest of the creditors. (4.) Where the debtor fails to pay the composition at the time agreed upon, or within a reasonable time after, the Court of Bankruptcy will not in general restrain a creditor suing at law to recover the amount of his original debt; but the Court may nevertheless in such a case give relief to the debtor by injunction where something has been done by the creditor which makes it inequitable that he should enforce his strict legal right, and perhaps also in cases of accident or mistake.

It may be observed that in the present case the correct amount of the debt due to *King* was not inserted in the debtors' statement of affairs, but I understood that it was not on that ground that the creditor contended that he was not bound by the composition, but solely on the ground that the debtors had not paid the composition, either on the amount inserted in their statement of affairs or on the true amount of the debt, at the time agreed upon, or within a reasonable time after. I think the questions for me to consider are, first, whether the debtors have made default in payment of the composition at the times agreed upon, or within a reasonable time after; secondly, whether anything has been done by the creditor which makes it inequitable that he should now enforce his strict legal right. In the view which I take of the case I do not think it necessary to determine the first question, for I have come to the conclusion that the course pursued by Mr. *King* makes it inequitable that he should now enforce his right to recover the amount of his original debt. My reasons for coming to this conclusion are as follows:—*King's* proof was considerably in excess of the true amount of his debt, and up to the 29th of July, 1873, he, in effect, declined to receive the amount of the composition to which he was really entitled. Upon this point I may refer to the observation of Lord Justice *Mellish* in *Ex parte Peacock* (Law Rep. 8 Ch. 688), that where a creditor "has done anything tending to shew that he was not ready to receive the composition, if tendered, that might be a circumstance to be taken into consideration." Under the arrangement come to on the 31st of January, 1872, *King* received an amount in excess of what was properly payable to him for the first instalment. He did not take any steps to sustain his proof until after both the remaining instalments had become payable, notwithstanding that on the 31st of January, 1872, he himself proposed that the Court of Bankruptcy should determine the true amount of his debt. After failure of the debtors to pay the second instalment, *King* elected to avail himself of the summary remedy given by the Act for enforcing the provisions of the composition by application to the Court of Bankruptcy, and after failure of the debtors to pay the third and last instalment, he applied to the Court of

(1) Law Rep. 7 Ch. 723. (2) Law Rep. 8 Ch. 595.
(3) Law Rep. 8 Ch. 743.

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Mr. *De Gex*, Q.C., and Mr. *Anstie*, for the debtors, were not called upon.

SIR JAMES BACON, C.J.:—

In this case I have had the advantage of reading the judgment of the learned County Court Judge, which is clear and luminous, and contains a very lucid statement of all the facts of the case. In

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Bankruptcy to investigate his proof. On this point I may refer to the observation of Mr. Justice *Willes* in *Edwards* v. *Coombe* (Law Rep. 7 C. P. 523): "His" (the creditor's) "ordinary common law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy." On the 29th of July, 1873, the true amount of *King's* debt, and of the composition payable to him, was ascertained by the Court of Bankruptcy, and, if the balance of the composition had been tendered to him on that day, or within a reasonable time after, I think the course pursued by him was such that it would then have been inequitable for him to have rejected the tender, and to have attempted to enforce his strict legal right to recover the amount of his original debt. The question then is, whether what occurred subsequently to the 29th of July, 1873, has altered the case. Now I feel some difficulty on this point, because I see no reason whatever why the ascertained balance of the composition should not have been paid at once, without waiting to have the order of the 29th of July, 1873, signed by the Registrar, and because the course pursued by the debtors on the 22nd of August, in proposing to pay the balance of composition by instalments in the shape of bills, tends to shew that they were not then ready and willing to pay the balance of the composition. It is however to be observed that it was the creditor's solicitor who first appears to have suggested by the letter of the 19th of August, 1873, that the balance of the composition should be paid after the order was signed. That suggestion was, I think, equivalent to saying to the debtors, "Pay the balance of composition when the order is signed, and our client will be satisfied," and would have a tendency to throw the debtors off their guard; and I think that, until the sort of consent given by that letter for postponing the payment until the order was signed had been clearly and expressly withdrawn by the creditor, it would not have been equitable that he should take advantage of the omission of the debtors to pay before the order was signed. As regards the course taken by the debtors in proposing payment of the composition by instalments in bills, though I am not surprised at the creditor considering that proposal as indicating inability to pay, still if, as I think, it was a mere proposal, without any positive refusal to pay the composition in cash down as soon as the order was signed, I think the creditor was not entitled at once to treat the debtors as having failed to pay the balance of composition, and that he should have simply given notice that, if the composition was not at once paid down in cash, he would proceed to recover the full amount of his original debt. Instead of taking this course he immediately claimed the full amount of his ori-

it he fully recognises all the authorities upon which the Appellant relies, and which decide that, although the failure of a debtor to pay to a creditor, at the appointed time, the amount of the composition which has been agreed upon under the provisions of sect. 126 of the Act sets the creditor at liberty to pursue all his legal remedies for his original debt, still that right is subject to the jurisdiction of the Court of Bankruptcy to restrain him from doing so upon equitable grounds, according to all the circumstances of the case. In the present case the amount of the debt was disputed; the circumstances under which it arose were complicated, and it was agreed that the amount should be determined by the Court. That was not done till the 29th of July, 1873. It was distinctly agreed that the order made on that day should be drawn up, and there could be no default in paying the balance of composition till that order was in force. It has been argued that what afterwards took place shewed inability on the part of the debtors to pay. The most, however, that is proved by what they did is, that it was inconvenient to them to pay until the 23rd of August. After the dispute as to the debt had been referred to the Registrar, and had been settled, could anything be more inequitable than that the creditor should take advantage of the debtors having asked him to accept payment partly in bills, to bring his action for the balance of the original debt? The learned Judge, after going through the facts with the most perfect fairness and clearness, has come to the conclusion which he has stated in his judgment. In my opinion he could not properly have come to any other conclusion. I must dismiss the appeal with costs, but it must be understood that the £320 7*s.* 3*d.* is to be paid at once.

Solicitors for the Appellant: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Debtors: Messrs. *Duignan & Smiles.*

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ginal debt. The balance of the composition was tendered in cash on the day the order was signed, and the action was not commenced until two days afterwards. In my opinion the course pursued by Mr. *King* makes it inequitable that he should now bring an action at law to recover the full amount of his original debt, and I shall grant an injunction to restrain him from further proceeding with the action. There will be liberty to apply. The debtors must of course be prepared to pay the £320 7*s.* 3*d.* at once in case *King* should be willing to take it. If they fail to do this the injunction will be dissolved.

M. R.

1874

Jan. 17.

FISHER *v.* FISHER.

Railway Company—Taking of Lands—Payment of Purchase-Money into Court —Transfer to Suit—Subsequent Costs.

Where the purchase-money for lands taken by a railway company under Parliamentary powers has been paid into Court to the usual account, and has afterwards been transferred to the credit of a suit to an account not intituled in the matter of the special Act, the Court has no jurisdiction to make the company pay subsequent costs of paying the fund out of Court.

THIS was a suit instituted for the administration of the trusts of the will of *Josiah Fisher*, who died on the 8th of June, 1835.

In 1839 the *Brighton Railway Company*, under the powers contained in a private Act of Parliament (1 Vict. c. xix), took part of the testator's estate, and paid the purchase-money into Court to the usual account, entitled, *Ex parte* the Company, in the Matter of the Act.

In 1839 an order was made directing the purchase-money to be invested in consols and carried to a separate account, which was intituled, In the Matter of the above-mentioned Act of Parliament.

In 1853 an order was made directing the fund to be carried over to an account intituled in the suit only, all reference to the company or the Act of Parliament being omitted.

The tenant for life under the will had recently died, and a Petition was now presented for distribution of various funds standing to the credit of the cause, including the fund which had arisen from the payment made by the railway company. The company were made Respondents; and the Petition asked that they might pay so much of the costs as related to the payment out of the last-mentioned fund.

The Act 1 Vict. c. xix. contained provisions similar to those of the *Lands Clauses Consolidation Act*, 1845; and in particular it was provided by sect. 91 that the costs, charges, and expenses occasioned only by the passing of the Act, and not by litigation between claimants or otherwise, of any proceedings thereby authorized for (amongst other matters) the payment of the investments of any purchase or compensation money, or of the money to be

produced by the sale thereof, out of Court, together with the necessary costs and charges of obtaining the proper order for such purposes, should be paid by the company.

M. R. 1874 FISHER v. FISHER.

Mr. *Morshead*, for the Petition, submitted that the Act conferred on the Petitioner a clear right to have these costs paid by the company, and that such right had not been lost by the fact of the fund having been transferred to the cause, although the omission of all reference to the company and Act of Parliament in the title of the account was probably a slip.

[He referred to *Brown* v. *Fenwick* (1).]

Mr. *Cookson*, for Respondents in the same interest.

Mr. *Kekewich*, for the company.

SIR G. JESSEL, M.R.:—

I have little doubt that a slip has been made; but the consequence is that I have no jurisdiction to make the company pay these costs, and the Petition must be dismissed as against them with costs.

Solicitors: Mr. *R. B. Horman Fisher*; Messrs. *Fisher & Fisher*; Messrs. *Norton, Rose, Norton, & Brewer*.

JACUBS *v.* RYLANCE.

M. R. 1874 Jan. 24.

[1869 J. 102.]

Defaulting Trustee—Beneficial Derivative Interest.

A defaulting trustee cannot claim, as against his *cestuis que trust*, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a *cestui que trust* who has died intestate.

THIS was a suit instituted for the administration of the estate of *Mary Anne Elkes*, who, by her will, dated the 30th of July, 1849, appointed her husband, *Edward Elkes*, executor, and bequeathed certain property, over which she had a power of disposition, to him

(1) 14 W. R. 257; W N (1866) 6

M. R. 1874 JACUBS v. RYLANCE.

upon trusts for the benefit of her five children. One of these children had died intestate, leaving *Edward Elkes* his sole next of kin, and a sum of £112 had been carried over to the separate account of this deceased child.

Edward Elkes had become insolvent, and a sum of about £700 was due from him to the estate.

The surviving children now applied for payment of the £112 to them. *Edward Elkes* was the legal personal representative of the deceased child, but did not appear.

Mr. *Ince*, for the application:—

Edward Elkes is a defaulting trustee to an extent largely exceeding this fund, and cannot claim any portion of the trust estate so long as the default is not made good: *Irby* v. *Irby* (1).

Mr. *Dauney*, for the assignee in insolvency of *Edward Elkes*:—

I admit that the *cestuis que trust* have a lien on the interest of a defaulting trustee in the trust estate, but they have no lien on the share of the deceased child, nor on any interest which the trustee derives from him.

Mr. *Holmes*, for a mortgagee under *Edward Elkes*.

SIR G. JESSEL, M.R.:—

In the view of this Court the trustee, who is indebted to the estate in a sum largely exceeding this fund, must be taken to have paid himself all that he can claim out of the moneys which have come to his hands, and for which he has not accounted. This is not a case of impounding a trust fund. The trustee has already had all that he can claim, and has paid himself; therefore the money standing to this account must be paid to the other children.

Solicitors: Messrs. *Edwards, Layton, & Jaques*; Messrs. *Walker, Twyford, & Co.*; Messrs. *Massey, Taylor, & Hales.*

(1) 25 Beav. 632. 4 Jur. N.S. 989

BROWN *v.* RYE.

M. R.
1874
Jan. 30.

[1873 B. 135.]

County Court—Equitable Jurisdiction—Concurrent Jurisdiction of Court of Chancery—Costs.

The Acts conferring equitable jurisdiction on the County Courts do not in any way prohibit or restrict a Plaintiff from instituting proceedings in the Court of Chancery; and a Plaintiff who institutes such proceedings is entitled to his usual costs.

Where, therefore, a suit was instituted in the Court of Chancery for foreclosure of a mortgage for £50:—

Held, that the Plaintiff was entitled to the usual costs of a mortgagee who sues in that Court.

THIS was a suit for foreclosure of an equitable mortgage created by a memorandum dated the 9th of March, 1870, to secure £50 and interest.

The parties resided more than twenty miles apart.

Mr. *A. Dixon*, for the Plaintiff, asked for the usual decree, with costs. It would be contended that, as the suit might have been instituted in the County Court, the Plaintiff ought to have only such costs as would have been recovered in that Court; but the County Court jurisdiction did not oust the jurisdiction of the Court of Chancery, and, in fact, the costs in the County Court were greater than those in this Court.

[He referred to *Picard* v. *Hine* (1).]

Mr. *Oswald*, for some of the Defendants:—

I contend that such costs only should be given as the Plaintiff would have had in the County Court. *Scotto* v. *Heritage* (2) is apparently a decision against me; but that case was decided by analogy to the common law practice as it then existed. At that time the Courts of Law had concurrent jurisdiction with the County Courts, where the parties resided more than twenty miles apart (9 & 10 Vict. c. 95, s. 128); but that has been altered since

(1) Law Rep. 5 Ch. 274.

(2) Law Rep. 3 Eq. 212.

M. R. 1874 BROWN v. RYE.

the decision in *Scotto* v. *Heritage* (1) by the *County Courts Act*, 1867 (30 & 31 Vict. c. 142, s. 33); and the Courts of Common Law, in exercising the discretion vested in them by that Act, do not take into consideration the distance at which the parties live: *Thompson* v. *Dallas* (2). I submit that the Courts of Equity ought to adopt the same principle; and if so, the case falls within *Simons* v. *McAdam* (3), where it was held, that, in a suit to foreclose a mortgage for £40, where both Plaintiff and Defendant lived at the same place, the Plaintiff was entitled only to such costs as he would have obtained in the County Court.

Mr. *Badnall*, for other Defendants.

SIR G. JESSEL, M.R.:—

Before the Acts conferring equitable jurisdiction on the County Courts were passed, the right of a Plaintiff to come to this Court was indisputable. To take that right away, clear words must have been used. What the Legislature has done is this: it has given a concurrent equitable jurisdiction to the County Courts, but the Acts contain no prohibition or restriction whatever with regard to the existing jurisdiction of this Court. More than that, the Legislature has restricted the jurisdiction of the Courts of Law by providing that in certain cases the Plaintiff shall have no costs if he brings his action in the superior Court. These provisions appear to me to afford clear indication of the intention of the Legislature, that in Courts of Equity things were to go on as before; and thus the equitable jurisdiction of the County Courts has been conferred for the benefit of Plaintiffs, and not of Defendants. The result is that the Plaintiff must have the usual costs of a mortgagee who sues in this Court.

Solicitors: Mr. *George Brown*; Messrs. *Crook & Smith*.

(1) Law Rep. 3 Eq. 212. (2) Law Rep. 3 Q. B. 358.
(3) Law Rep. 6 Eq. 324.

In re GOODWIN'S TRUST.

M. R.
1874
Jan. 31.

Will—Gift to Unborn Illegitimate Children of Testator—Marriage with Deceased Wife's Sister.

A gift by a testator or testatrix to his or her unborn child by a particular person, not being the wife or husband of the testator or testatrix, is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix.

Where, therefore, a testatrix who had gone through the ceremony of marriage with *P.*, the husband of her deceased sister, bequeathed her residuary estate upon trust for all her children by *P.*, and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:—

Held, that the second child, having before the death of the testatrix acquired the reputation of being her child by *P.*, was entitled to share in the estate.

IN December, 1849, *Richard Perkins* went through the ceremony of marriage with *Mary Goodwin*, his deceased wife's sister.

On the 15th of July, 1850, *Mary Goodwin* made her will, by which she bequeathed her residuary personal estate upon trust for *Richard Perkins* during his life, and after his decease upon trust to pay and divide the trust premises unto and equally between and amongst all and every her children and child by the said *Richard Perkins*, share and share alike, to be vested interests in sons at twenty-one and in daughters at that age or on marriage.

Mary Goodwin died on the 1st of May, 1860. She had issue four children, viz., *John Goodwin Perkins*, the Petitioner, who was born on the 15th of June, 1850; *William Harry Perkins*, who was born on the 25th of March, 1860; and two other sons who died in infancy.

It appeared that the birth of *William Harry Perkins* was registered by *Richard Perkins* on the 26th of April, 1860, and in the certificate of such registration the child was described as the son of *Richard Perkins* and *Mary Perkins*, late *Goodwin*.

Part of *Mary Goodwin's* estate having been paid into Court under the *Trustee Relief Act*, a Petition was now presented by

M. R. 1874

In re Goodwin's Trust.

John Goodwin Perkins, praying that the fund might be paid out on the joint receipt of himself and *Richard Perkins*.

Mr. *Heath*, for the Petitioner, submitted that *William Harry Perkins* was not entitled to any share of the fund, referring to the *dicta* in *Hill* v. *Crook* (1) as shewing that a gift to a general class of after-born illegitimate children could not be supported. The decision in *Occleston* v. *Fullalove* (2) was distinguishable: first, because the gift there was to "reputed children;" and secondly, because the child there held to be entitled was *en ventre* at the date of the will; here *William Harry Perkins* was not born until eight years after the date of the will.

Mr. *W. W. Karslake*, Mr. *Langley*, and Mr. *W. Pearson*, for Respondents.

Sir G. Jessel, M.R.:—

The principle of the decision in *Occleston* v. *Fullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix. If so, this case falls clearly within it. The certificate shews that before the death of *Mary Goodwin*, *William Harry Perkins* had acquired the reputation of being her child by *Richard Perkins*, consequently the Petitioner is only entitled to have half of the fund paid out of Court.

Solicitors: Messrs. *Hawks, Willmott, & Stokes;* Mr. *Mander*, agent for Messrs. *Miles, Gregory, & Bouskell, Leicester.*

(1) Law Rep. 6 H. L. 265. (2) Law Rep. 9 Ch. 147.

TALBOT *v.* TALBOT.

M. R.
1874
Feb. 9.

[1869 T. 96.]

Practice—Suit by Infant—Death of Next Friend—Appointment of New Next Friend—Paternal Relations of Infant—Affidavit of Fitness.

Where the next friend of an infant Plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend; and their nominee may obtain orders of course in the suit changing the solicitors on the record and appointing himself next friend.

In such a case the order appointing the new next friend need not be supported by any affidavit as to his fitness.

THIS suit was instituted in 1869 on behalf of *Algernon Charles Talbot*, an infant, by *Mary Matilda Talbot*, widow, his mother and next friend. The bill prayed that provision might be made for the maintenance and education of the infant Plaintiff out of the rents and profits of certain real estate to which he was entitled for his life, and that a receiver of the rents and profits thereof might be appointed during his minority. A decree was made and a receiver appointed. Messrs. *Frere & Co.* were the Plaintiff's solicitors.

Mary Matilda Talbot died on the 1st of January, 1874, having by her will appointed the Earl of *Shrewsbury* and Mr. *Frere* (a member of the firm of *Frere & Co.*) guardians of the Plaintiff.

At the time of Mrs. *Talbot's* death the nearest paternal relations of the Plaintiff were his grandfather, an uncle, and an aunt, all of whom were desirous that Mr. *Hervey Talbot*, the paternal uncle, should be the new next friend of the infant.

On the 7th of January, 1874, a petition was presented at the Rolls in the suit in the name of the infant Plaintiff by *Hervey Talbot*, his next friend, alleging that the Plaintiff was desirous of changing his solicitors, and of appointing Messrs. *Nicholson & Herbert* his solicitors in the place of Messrs. *Frere & Co.*, and praying accordingly; and on the same day the common order of course was made on the petition, that the Plaintiff be at liberty to change his solicitors by appointing Messrs. *Nicholson & Herbert* his solicitors in the place of Messrs. *Frere & Co.*

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On the same day another order of course was made on a similar petition (also presented in the name of the infant by *Hervey Talbot*, his next friend,) appointing *Hervey Talbot* the new next friend of the infant in the suit.

Neither of these orders was supported by any evidence; nor was either petition served on any one.

A motion was now made on behalf of the infant by Mr. *Frere*, as his next friend for the purposes of the application, that the orders of course of the 7th of January, 1874, might be discharged, and that the Earl of *Shrewsbury* might be approved of as next friend in the place of *Hervey Talbot*.

Mr. *Fry*, Q.C., and Mr. *Cookson*, for the motion, contended that the orders were quite irregular. The correct practice was thus laid down: "When, in consequence of the death, incapacity, or removal of the next friend of an infant, pending the suit, it becomes necessary to appoint a new next friend, the proper course of proceeding is for the solicitor of the Plaintiff to apply to the Court or Judge at Chambers for an order appointing a new next friend in his stead, whose fitness must be proved": *Daniell's* Chancery Practice (1). There had thus been two irregularities: first, no opportunity had been allowed to Messrs. *Frere & Co.*, the Plaintiff's solicitors, to appoint a new next friend; and, secondly, no evidence had been given of the fitness of *Hervey Talbot*. Such evidence was held to be necessary in *Harrison* v. *Harrison* (2).

[The MASTER OF THE ROLLS pointed out that in *Harrison* v. *Harrison* the original next friend was seeking to be discharged, and that the decision only amounted to this, that the Court would not discharge a next friend unless an equally solvent next friend were substituted; and he directed inquiry to be made in the office as to the practice. The result of this inquiry is stated in the judgment.]

They also contended, on the evidence, that *Hervey Talbot* was not a proper person to be appointed new next friend.

Mr. *Colquhoun*, for the Earl of *Shrewsbury*, who was guardian

(1) 5th Ed. p. 75. (2) 5 Beav. 130.

ad litem of infant Defendants, and had been served with the notice of motion, submitted to act as the Court might direct.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for *Hervey Talbot*, were not called upon.

SIR G. JESSEL, M.R.:—

I am of opinion that a more baseless motion than this has never occupied the time of the Court.

An infant, aged fifteen, institutes a suit by his next friend. The next friend dies, and thereupon it becomes necessary to appoint a new next friend. The infant has a great number of relations. By the rules and practice of the Court in such matters, the paternal relations are first to be consulted. The paternal relations in this case consist of the grandfather of the infant, an uncle, and an aunt, all of whom are unanimous in desiring that Mr. *Hervey Talbot*, the paternal uncle, should be the next friend. Mr. *Hervey Talbot* instructs his solicitors to take proceedings for getting him appointed next friend. The solicitors take steps accordingly; they obtain two orders of course, one for changing the Plaintiff's solicitors, and the other appointing Mr. *Hervey Talbot* next friend. It is said that the latter of these orders ought to have been made on an affidavit of fitness, but no authority has been cited for that proposition; and I have by personal inquiry ascertained that the practice of the office is the other way, and I cannot sustain that objection.

[His Honour then considered the objections which had been raised to the fitness of Mr. *Hervey Talbot*, and came to the conclusion that, on the evidence, they were quite unfounded, and refused the motion with costs.]

Solicitors: Messrs. *Frere & Co.*; Messrs. *Herbert & Nicholson*; Messrs. *Parkin & Pagden*.

M. R.
1874
Feb. 16.

CHAPMAN *v.* CHAPMAN.

Practice—Payment out of Court—Order for Payment—Death of Party named in the Order—Payment to Representatives—Chancery Funds Rules, 1872, *r.* 22.

By an order made in 1827 part of the dividends of a fund in Court was ordered to be paid to *A.* during the life of *B.* *A.* died in 1873 in the lifetime of *B.*:—

Held, that under the Chancery Funds Rules, 1872, r. 22, the executor of *A.*, though not named in the order, was entitled to have the future dividends paid to him without any fresh order being made.

ANN RIDEOUT, being tenant for life of a fund in Court in the above suit, granted an annuity of £15 10*s.* to *William Martyn*, and secured it by a charge on the fund.

On the 23rd of March, 1827, an order was made that out of the dividends of the fund the sum of £15 10*s.* should be paid to *William Martyn* during the life of *Ann Rideout*, and that the residue of such dividends should be paid to *Ann Rideout* during her life. *William Martyn* had lately died. *Ann Rideout* was still living.

The executors of *William Martyn* produced the probate of the will of *William Martyn* to the Paymaster General, and asked for payment to them under rule 22 of the Chancery Funds Rules, 1872; but the Paymaster-General doubted whether the case was within the order, because, first, the order was made before the rule; secondly, the payment was a recurring payment; and thirdly, the payment was to be made to *William Martyn* as mortgagee, and not in his own right.

Mr. *C. Browne* now mentioned the matter to the Court.

THE MASTER OF THE ROLLS said that he had had an opportunity of considering the point, and thought that the case fell within the rule.

Solicitor: Mr. *G. E. Thomas.*

(1) See Law Rep. 7 Ch. xlii

FORSTER *v.* ABRAHAM.

M. R.
1874
Jan. 20, 21.

[1873 F. 321.]

Will—Power of Sale—Power to appoint New Trustees—Appointment of Tenant for Life—Title—Vendor and Purchaser.

Testator devised his real estate to trustees, in trust for his wife for life, with remainder to *F.* for life, with remainders over, and with a power of sale, at the discretion of the trustees or trustee for the time being, and with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed the testator's widow and *F.* new trustees jointly with himself. *F.* being sole surviving trustee contracted for the sale of part of the property:—

Held, that the power to appoint new trustees had been well exercised, there being nothing in the will to prevent the appointment of a tenant for life as trustee; and that *F.* could make a good title to the property, which the Court would enforce upon a purchaser.

THIS was a demurrer to a bill filed by a vendor for specific performance of a contract for sale of certain real estate.

Charles Smith Forster, who died in 1850, by his will, made in 1847, devised all his real estate (which included a moiety of the lands contracted to be sold) unto and to the use of his brother *John Forster*, *Charles Emery*, *Philip Pratt*, and *George Stubbs*, their heirs and assigns, upon trust to pay to his wife, *Elizabeth Forster*, the rents thereof for her life, and after her decease to pay the same to his only son, the Plaintiff, for his life, and after the Plaintiff's decease on certain trusts for the Plaintiff's issue and on other trusts. And it was thereby declared that, in the discretion and of the proper authority of the trustees or trustee for the time being of his said will, all or any part of the hereditaments so devised by him should or might be absolutely sold. And the testator bequeathed the residue of his personal estate to the same trustees upon trust to invest the same at interest, and to pay to his wife the dividends and income thereof during her life, and after her decease upon the trusts therein mentioned. And the testator appointed his wife and the Plaintiff and the said *Philip Pratt* and *George Stubbs* his executors (but revoked the appointment of *Pratt* and *Stubbs* by

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a subsequent codicil). And it was by the said will provided that if the said trustees, or any of them, should die in his lifetime, or should at his decease decline to accept, or become incapable of accepting the trusts therein contained, or if the said trustees, or any of them, or any future trustee or trustees to be appointed under that provision in their place, should at any time after his decease die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts of the will, it should be lawful for the surviving or acting trustee or trustees for the time being of the will, or the executors or administrators of the last surviving or acting trustee, with the consent of the person or persons who should for the time being be entitled to the rents of the said real estates, and the income of the said trust moneys and his personal estate, if adult, otherwise at the discretion of such trustee or trustees, or the executors or administrators of the last surviving or acting trustee, to nominate a fit person or persons to succeed the trustee or trustees respectively so dying, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid; and providing that the trust estate should be conveyed to such new trustees jointly with the surviving trustee, or solely; and that every such new trustee should have the same powers as if he had been appointed a trustee by the said will.

John Forster, *Philip Pratt*, and *George Stubbs* disclaimed by deed the devises and trusts of the will.

By an indenture of the 1st of January, 1852, and made between *Charles Emery*, of the first part, *Elizabeth Forster*, of the second part, and *Samuel Wilkinson*, of the third part, after reciting that the said *Charles Emery*, as the sole acting trustee of the said will, in exercise of the power reserved to him in that behalf, had at the request of *Elizabeth Forster* (being the person then entitled to the income of the estate) agreed to appoint the said *Elizabeth Forster* and the Plaintiff to be trustees of the will to succeed *John Forster*, *Philip Pratt*, and *George Stubbs*, it was witnessed that *Charles Emery*, by virtue of the said power, with the consent of *Elizabeth Forster*, appointed the said *Elizabeth Forster* and the Plaintiff to be trustees in the place of the said *John Forster*, *Philip Pratt*, and *George Stubbs*, for all the trusts, and with all the powers contained in the will; and that he conveyed all the hereditaments vested in

him as such acting trustee of the will to the said *Elizabeth Forster* and the Plaintiff to the use of the said *Charles Emery*, *Elizabeth Forster*, and the Plaintiff in fee, upon and for the trusts and purposes, and with and subject to the powers, provisions, and declarations in the will contained.

Charles Emery died in 1864; *Elizabeth Forster* died in 1869, and no other trustee of the will had been appointed.

In 1873 the Plaintiff, acting as surviving trustee of the will, as well as in his own right, contracted with the Defendant for the sale of certain lands, one moiety of which formed part of the trust estate of the testator, and the other moiety belonged to the Plaintiff.

The Defendant objected to complete the purchase on the ground that the appointment of the Plaintiff to be a trustee of the will was invalid, regard being had to his position as tenant for life under the will, and that, therefore, the Plaintiff had no power to sell the premises.

The Plaintiff filed his bill for specific performance, and the question of the validity of the Plaintiff's appointment as trustee was raised by demurrer.

Mr. *Fry*, Q.C., and Mr. *Beale*, for the Defendant, in support of the demurrer:—

The question in this case is, whether it was competent for the sole acting trustee of the will to appoint two successive tenants for life, namely, the testator's widow and the Plaintiff, as trustees of the devised estates. We contend that it was not; for in the case of trustees with a power of sale it is not allowable in appointing new trustees to appoint a tenant for life in possession to be such new trustee.

Here it was not competent to the acting trustee in the appointment of new trustees to look merely to the interest of the tenants for life, yet the appointment in question might not have been for the benefit of those entitled in remainder. Moreover, the Court when appointing new trustees is always jealous of appointing a tenant for life. In this case the scope of the will indicates an intention on the part of the testator that the tenants for life under the will should not be appointed trustees.

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In the case of *In re Tempest* (1) the principle was laid down, that the Court in appointing a new trustee will have regard to the wishes of the author of the trust as may be deduced from the instrument; and also that the Court will not appoint a person with a view to the interest of some of the *cestuis que trust.*

We submit that the power was not properly exercised by the appointment of the Plaintiff as trustee, and that, therefore, he cannot make a title to the property.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Plaintiff, were not called on.

SIR G. JESSEL, M.R.:—

I will not trouble you, Mr. *Southgate.* I take it that it is the duty of the Court in all these cases to give an opinion whether the title is good or bad.

This is a pure question of law, and, therefore, following the decision of the Appeal Court in *Alexander* v. *Mills* (2), I decide that the title is not doubtful, but that it is good.

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It is not disputed that the appointment was warranted by the express terms of the power; but it is said that it was a bad appointment on one or both of the two grounds which I am going to mention. First of all it is said that in the case of trustees with a power of sale it is not allowable to appoint the tenant for life in possession as one of the trustees of the power of sale. I am not aware of any authority for any such proposition, nor do I think the proposition founded either in reason or in the practice of conveyancers. Under the old form of settlement, the common form (with which I am by no means unfamiliar) was not to vest the power of sale, strictly so called, in trustees, but to vest it in the trustees in this way: it was a power and direction to the trustees to sell at the request of the tenant for life. The result, therefore, was in fact to give the power to the tenant for life, and the only use of putting in the trustees was to secure the due application of the purchase-money. I know that now the more common form is to give it to the trustees with the consent of the tenant for life; but the older form is still sometimes in use. Therefore this supposed disability

(1) Law Rep. 1 Ch. 485. (2) Law Rep. 6 Ch. 124.

imposed on the tenant for life, as to determining the time of sale, on the ground that his interest might be conflicting, has no existence according to usage. Of course in questions of this kind, as regards the mode of settlement of the real estate, this must weigh very much with the Court. It has not been considered that there has been any impropriety or conflict of interest, as regards the time of sale or the necessity for a sale, between the position of the tenant for life and the position of the other parties claiming under the settlement.

Is there then any objection in reason? I think not. It is quite true that now and then the tenant for life may require a sale for the purpose of increasing his income; but that is a very rare case. As a general rule there is no one more anxious than the tenant for life to keep the estate unsold, and there is no one more likely than the tenant for life to take care that it is sold on a proper occasion, and when it will realise the highest possible price. If my opinion were asked on the reason of the thing, I should say that on the whole the tenant for life is the person most likely to be the best judge.

I am now going to the next point which I have alluded to, that is as to practice and usage. According to my experience, which, I am sorry to say, is not very short, the practice is for the tenant for life to sell the estate, and to enter into the contract for sale, and then to apply afterwards to the trustees to join. In reality, therefore, the trustees do not determine the time of sale. I have known many cases in which the actual contract has been signed by the tenant for life before any communication whatever was made to the trustees. No doubt the more usual and the more polite course is, when arrangements have been made, or are contemplated, for the sale of an estate, to inform the trustees before everything is finally settled; but, as a rule, the initiation of the sale, according to my experience, proceeds from the tenant for life.

Looking, then, both to the reason of the thing, and to the practice and usage of conveyancers, I see no reasonable ground for saying that the appointment of the tenant for life *per se* is improper. I find also that although, as a rule, the Court of Chancery exercises its discretion in the appointment of new trustees—a discretion I may say as regards which I respectfully wish to express

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my cordial assent to what fell from Lord Justice *Turner* in the case of *In re Tempest* (1)—yet it is not an arbitrary discretion, but to be applied according to settled rules. Then exercising that discretion, as I said before, the general rule is that the Court of Chancery will not appoint the tenant for life, although it may do so, and sometimes has done so. Therefore there is no insuperable objection to the tenant for life *per se*, that is, nothing to make the appointment invalid.

The other ground is this, that even assuming that to be the general rule, yet there are in this case indications in the will that the testator did not wish the tenant for life to be appointed. I think that is not made out; that is to say, there are no indications of a binding character, because the mere intimation of a wish, if it were not made so far a part of the will as to be binding, would be useless.

On this point I was referred to the case of *In re Tempest*, which does not appear to me to have any direct bearing upon it. That was an appointment by the Court; the Court thought that, though not bound by an intimation of this kind to be found in the will, it would be proper to have regard to it; but the very form of the judgment in that case shews that it was not binding on the Court. The Court might have appointed the gentleman named; it did not choose to do so; it held its hand on account of this indication of intention, shewing most clearly that if the appointment had been made by the Court it would have been valid. It was not under the notion that the appointment if made would be invalid; but it was, that, there being a discretion to be exercised, it was for the Court to look at any indications expressed of a wish on the part of the testator, to guide the Court in the exercise of its discretion. Of course, if the testator had given definite instructions in his will, those would have amounted to declarations of intention, which the Court could not have disregarded, because they would have been a part of the will itself. Therefore, when we come to consider the case of *In re Tempest*, it is rather an authority against this demurrer than in favour of it.

Is there, then, anything on the face of this will which shews that distrust of the tenants for life which was indicated, or which

(1) Law Rep. 1 Ch. 485.

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the Court decided to be indicated, in the case of *In re Tempest?* (1) So far from that I find the greatest trust and confidence reposed in the tenants for life in this case. The tenants for life are made executors, and have the control of the investment of the personal estate, shewing the confidence placed in them by the testator. It is difficult to say that that is not strong evidence that they might be trusted with the sale of his real estates, or the application of the moneys to be produced from the sale.

The next point is this: There is a power to appoint new trustees. I find the consent of the successive tenants for life is absolutely required for the exercise of that power. Here, again, the testator has trusted the tenants for life to act as trustees independently of their beneficial interest, and he has considered that the last surviving trustee and the tenant for life are the persons who are to select the new trustees. Therefore I can find no evidence in this will of any distrust or want of confidence on the part of the testator, and that was the ground in *In re Tempest.* I am strongly of opinion that the Court thought there was an anxious desire to exclude the gentleman who was the nominee in that case. I can find nothing more here than the fact that the tenants for life were not appointed trustees in the first instance, which by no means shews that they were incapable of being appointed; on the contrary, the power is to appoint "any fit persons," which means persons individually fit.

I am of opinion, therefore, that there is really nothing special in this will at all to induce the Court, assuming the general rule to be as I have stated, to exclude these tenants for life. I think, therefore, that the argument on both these grounds fails. Although I do not say that the Court would have made this appointment, yet, it having been made under a power in the will, which I think was properly exercisable and properly exercised, I am of opinion that it is a good title. Therefore the demurrer must be overruled, and, of course, with the usual consequences.

Solicitors: Messrs. *Beale, Marigold, & Beale;* Messrs. *Pearce & Son,* agents for Messrs. *Wilkinson & Gillespie, Walsall.*

(1) Law Rep. 1 Ch. 485.

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1873
Dec. 11, 12.

LORD ABINGER *v.* ASHTON.

[1872 A. 15.]

Lease of Coal Mines—Covenant by Lessees—Mode of Working—Working Seams in consecutive Order—Evidence of Custom—Bill for Injunction.

By a lease of collieries in *Cheshire*, certain pits or mines, comprising the *T.* mine, which was the uppermost, the *B.* mine, which was the next, and the *C.* mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect.

On a bill by the lessor, alleging that the Defendants, after having for some time worked the said three mines, had ceased working the *T.* mine, and also that they were working the *C.* mine in advance of the *B.* mine, and praying injunctions accordingly:—

Held, that, under the terms of the covenant, the Defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the Court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the Defendants were committing a breach of the covenant; and the bill was dismissed with costs.

THIS was a suit by the owners of an estate in *Dukinfield* and *Newton*, in the county of *Chester*, under which certain coal mines were situated, against the lessees of the said mines, to restrain them from further digging any coal or carrying on any workings in one of the mines, called the *Cannel Mine*, until they had carried on the workings in another mine, called the *Black Mine*, to the same point to which the working of the first-named mine had been extended, and also restrain them from working the *Black* and *Cannel Mines* without working the *Town Lane Mine*.

The mines or beds of coal and cannel in question in the suit consisted (besides many others which had never been worked) of the *Town Lane Mine*, which was the uppermost, the *Black Mine*, which was the next, and the *Cannel Mine*, which was the lowest of the three which had been worked.

Before the date of his lease to the Defendants, the lessor, *Francis Astley*, had sunk a pit called *Astley's New Pit*, and by means of it

had gotten portions of the *Town Lane Mine*, and had begun to work it; he had also driven out roads and airways, or air gates, from the pit on the north and south sides to the boundary of the *Town Lane Mine*, and had worked back from that furthest extremity on the north side, and gotten the *Town Lane Mine* or seam of coal, working backwards on the north side, and was preparing to work on the south side, and had also placed machinery in the pit for the purpose of working it.

By the lease of the 15th of November, 1856, made between *Francis Astley* of the one part, and the Defendants of the other part, *Astley* demised to the lessees "all such parts and portions, or so much and such part of all those several mines, delphs, veins, and beds of coal and cannel lying and being under the lands and grounds of *Francis Astley* as were not then leased, and called the *Black Mine*, the *Town Lane Mine*, and the *Peacock Mine*, and all other mines of coal and cannel lying between the *Great* and *Roger Mines* and the *Peacock Mine* (with certain exceptions), and also the pit called '*Astley's New Pit*,'" with its steam engines and buildings, and all the machinery therein mentioned, with the power to get the same mines, and to make and sink any pits, and drive any tunnels or trenches, and to make any canals, watercourses, and fences, and to set up any engines or machinery therein mentioned: To hold the demised premises for twenty-three years at the rents and quarterages thereinafter mentioned in particular for the pit called *Astley's New Pit*, in addition to the quarterages, the yearly rent of £3000, payable quarterly, the first payment to be a quarter after the lessees should, by sinking *Astley's New Pit* 300 yards below the present depth, pursuant to a covenant for that purpose thereinafter contained, had arrived at the mine of coal called the *Black Mine*, and until that time £250 only quarterly.

The lease also contained provisions for working the mines, for using the roads for the purpose of carting away the produce of the mines, and also a covenant by the lessees "that they shall and will at all times during the term, work, use, manage, and carry on the said mines thereby demised with their utmost care and ability, and with a competent number of workmen, and in the best and most effectual manner, to the best advantage, and accord-

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ing to the common mode and usual practice of carrying on all coal works or collieries with effect, and according to the true intent and meaning of these presents; and that no coal or cannel coal shall be riddled at the bottom of the coal pits, or either or any of them, but that all the coal, cannel, and slack shall be gotten or brought up from the said mines; the coal and cannel hereby demised, and each and every of them shall be free and honestly gotten or brought up out of all the coal pits then open, or that shall be made or sunk by virtue of such lease to the ground above in order to be freely and properly sold."

The Defendants sunk the pit called *Astley's New Pit*, so as to reach the mine called the *Black Mine*, which they commenced working in 1858.

In 1862 the Defendants carried tunnels from *Astley's New Pit* lower than the *Black Mine* down into the mine or seam of coal called the *Cannel Mine*, which was said to produce coal of a better quality and commanding a higher price than that produced from the *Town Lane Mine* and the *Black Mine*. They subsequently, under a new agreement, sunk a second shaft, which was used as the upcast shaft for ventilation, and was also used until the accident hereinafter stated for the purpose of working the *Town Lane Mine*, the two lower mines being worked through the *Astley's New Pit*. In the beginning of 1870 an accident occurred in the *Dunkirk Colliery* of the Defendants, by which several lives were lost, which caused attention to be directed to the ventilation of the mine.

In September, 1870, the Plaintiffs, the trustees under the will of *Francis Astley* (who had died in 1866), caused a written requisition to be sent to the Defendants, requiring them to work in a proper and workmanlike manner the coal called the *Town Lane Mine*, and to keep open and in proper condition all the airways and roads in the same mine, pursuant to the provisions in the said lease.

The Plaintiffs alleged that the Defendants, for some time after working the *Town Lane Mine* in the manner commenced by the said *Francis Astley*, at the extremity of the mine and of the roads and airways commenced by *Astley*, worked the same mine on the south side from near the mouthing of the mine into the air or upcast pit, by means of scaffolding cages and machinery, and

worked this without having proper pillars on each side of the roads and airways as far as they worked, and so choking up the roads and airways beyond the workings as made by *Astley*, and left by him at the commencement of the lease; that the Defendants afterwards improperly worked the *Town Lane Mine*, and worked it only a few hundred yards from the mouthing, and shut up the airways and roads in the said mine, and left a large block of the *Town Lane Mine* unworked and ungotten, and had allowed the levels and airgates and water-levels in the same mine to become choked and out of repair.

The Plaintiffs further alleged that the Defendants were working the *Black Mine* and *Cannel Mine* without working the *Town Lane Mine*, whereas they were bound to continue the workings of each of the three mines after they had commenced them until each mine was exhausted, and to work the block of the *Town Lane Mine* which they had left unworked; that the Defendants had lately ceased to work the *Town Lane Mine*, and had taken away the scaffolding and machinery placed by them on the demised premises for working that mine, and had done so without regard to the covenants in the lease and the practice of good mining, under the pretext that they could not otherwise comply with the provisions of the Act for the regulation of mines, 23 & 24 Vict. c. 151, s. 10, r. 1, which related to ventilation.

The Plaintiffs further alleged that the Defendants were working the *Cannel Mine* to the detriment of the *Town Lane Mine* and the *Black Mine;* that the *Cannel Mine* was only fifty yards below the *Black Mine;* and that, having regard to the nature of the coal measures, the Defendants ought, by the rules of good mining and according to the covenants in the lease, not to work the *Cannel Mine* beyond and in advance of the workings of the *Black Mine*, but that they had worked, and were continuing to work, the *Cannel Mine* in advance of the workings of the *Black Mine*.

The bill prayed, First: That it might be declared that the Defendants were bound under their lease not to work the *Cannel Mine*, and that they might be restrained by injunction from further digging any coal or carrying any workings in the *Cannel Mine* until they had carried on their workings in the *Black Mine* to the same point to which they had extended their workings in

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the *Cannel Mine*, and from working the *Cannel Mine* to a point beyond their workings of the *Black Mine;* Secondly: That the Defendants might be restrained from allowing the roads and airways in the *Town Lane Mine* to remain choked up, or otherwise than open and in proper working order, and from continuing the removal of the machinery, scaffolding, and cages for working the *Town Lane Mine;* Thirdly: That it might be declared that the Defendants were bound to continue to work the *Town Lane Mine* in a proper manner, and might be restrained from working or getting out coal from the *Black Mine* and *Cannel Mine*, or from the *Dunkirk Colliery*, without continuing to work the *Town Lane Mine* in a proper manner and according to the covenants in the lease; Fourthly: That the Defendants might be ordered, in addition to, or substitution for, any portion of the relief prayed, to pay to the Plaintiffs such damages as the Court should direct; and for consequential relief.

The Defendants, by their answer, submitted that working the said mines in the manner they had done was justified by the circumstances of the case; and that it was not to the prejudice of the other mines comprised in the lease, and was consistent with the covenants in the lease, and was in accordance with the rules of good mining.

The Defendants stated that, after the accident before referred to, the Government Inspector pronounced the ventilation inadequate, and gave his opinion that with the mode of working then practiced, namely, raising the coal from the upper mine through the upcast shaft, the ventilation was inadequate for safety, and suggested that the upcast shaft or *Town Lane Pit* should be devoted exclusively to the purposes of ventilation, for which alone it had been originally sunk. They stated that they then caused a minute inspection of the colliery to be made by Mr. *Cross* and Mr. *Higson*, two eminent mining engineers, who made a report on the 21st of September, 1870, as to the causes of the defective ventilation of the colliery, and after recommending the removal of a scaffold at the *Town Lane Mine*, they continued thus: "We are of opinion that the *Lower Mine* cannot be sufficiently and safely ventilated so long as the *Town Lane* is being worked; and as it appears that the protection of life is an equal protection of

property, we advise you to abandon the *Town Lane Mine*, and work with increased energy the *Black* and *Cannel Mines*, and thereby avoid the present excessive risk, at the same time that you will secure a better result for all parties concerned."

The Defendants stated that the *Cannel Mine* was about fifty yards only below the *Black Mine*; that they were advised by competent authorities that they ought not, by the rules of good mining, or according to the covenants in the lease, to abstain from working the *Cannel Mine* to a point below and in advance of the workings in the *Black Mine*.

The Defendants submitted that they ought to allow the roads and airways in the *Town Lane Mine* to remain as at present; and that they were working the *Black Mine* and *Cannel Mine* in the only proper manner, which was to work them without working the *Town Lane Mine*.

There was a considerable amount of evidence on both sides. The following were some of the most material passages in the Plaintiffs' evidence :—

Isaac Wheeldon, a mining agent in *Cheshire*, stated that "the common mode and usual practice of carrying on coal works of this character was, when the seams were not separated by a very great interval, to work the same together, or to work the upper seam in advance of the seam which was next below it, and not to work such lower seam in advance of such upper seam."

Thomas Livesey, mining engineer, deposed as follows :—"The working of one mine under another has the effect of breaking the strata between the two mines, and the *Black Mine* being only fifty yards or thereabouts above the *Cannel Mine*, this would be likely to take place, and thus injure the *Black Mine* both as to the facility of working afterwards, and also as to the quality of coal, thereby doing an injury to the lessor."

Isaac Wheeldon, in a further affidavit, said :—"The allegation in the Defendants' answer to the effect that it was well known that no one would take a lease of collieries with a restriction requiring the mines to be worked successively from above downwards, does not accurately represent the practice of good mining as understood by competent engineers; the contrary is in many instances true, for in *Derbyshire* it will be found that lessees are absolutely re-

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stricted by their leases from working lower mines in advance of those above them. When the distance between mines is considerable, a lower mine may be worked in advance of an upper without so much injury to the latter as where the distance is small; but under any circumstances the best and most approved method of working is from above downwards."

The Defendants' witnesses stated that it was the usual practice in the district to work a lower seam of coal in advance of an upper seam, when it was commercially desirable to do so. They mentioned specifically several instances where it had been done in *South Lancashire* and *Cheshire*, and said that they considered it the best practice in mining, for though it might damage the roads, that would only be an injury to the lessee of the mine, who would be bound to repair them, but that as regarded the mine itself, it would improve the upper mine and increase the coal to the extent of 50 per cent. The following were some of the material parts of the evidence:—

William Bryham, mining engineer and colliery proprietor, deposed:—That he had had considerable experience in working the cannel and other seams of coal in the *Wigan* district, and had to a large extent worked the cannel seam in advance of the superincumbent seams without any injury or detriment to the latter; that he was at present working the *Wigan* five-feet and the *Wigan* four-feet seams extensively over an area of about 200 acres from which the cannel and King coal seams had been recently exhausted (the two latter seams averaging in thickness about 4ft. 9in.), and lying at the respective distances of 120 yards and 144 yards above the cannel seam; that he was convinced from experience that they had not in the least suffered, and the seams were equally as productive and as economically worked as when the cannel was ungotten; that *Wigan* district was the real cannel district; that in all that district the great bulk of the cannel was worked out long before the coal; that he had many cannel mines under his management; that in every case he had gone on working the cannel first irrespective of the upper seams; that in the *Wigan* district there was ninety yards distance between cannel and upper seams, but it was not an uncommon practice to work out a lower seam when only twenty or twenty-five yards intervened; that in

his experience no material damage had ever arisen; that something depended on the thickness of the seams—working a thin seam like the cannel seam in the *Astley Pit*, 2ft. 3in., could not, in his opinion, cause damage to the upper mine; and that it was a common custom to work the best seams first, irrespective of position, unless where the lease specified; he considered it to be in accordance with the rules of good mining to work in that mode.

Alfred Hewlett, colliery proprietor and mining engineer, deposed:—That he was largely engaged in the management and conduct of collieries and iron works, and had been so for the last twenty-seven years—in fact from his boyhood; that he was a Fellow of the *Geological Society of London*, and President of the *Mining Association of Great Britain*, and was the Managing Director of the *Wigan Coal and Iron Company, Limited*, whose collieries were about the most extensive in the kingdom, employing about 10,000 hands, and raising about 2,000,000 tons of coal per annum; that he also had very considerable experience in the system of working mines in almost all the districts in the kingdom; that the workings of the *Wigan Coal and Iron Company, Limited*, extended over several thousands of acres of mining ground held under lease from a great number of landowners, and were situate in no less than thirteen different townships in and about *Wigan;* that it was entirely unusual, and contrary to the common practice of mining in that district, to compel a lessee to work or pay for an upper mine in quantity equal to that which might be gotten in the subjacent mine; that such a covenant did not exist in the leases granted to the *Wigan Coal and Iron Company, Limited*, and, in his judgment, such a covenant would not be conducive to good mining, nor would it be either in the interests of the lessor or the lessee; and that he considered the obligation attempted to be enforced upon the lessees (the Defendants in this suit) to be contrary to the usual custom of fair workmanlike and skilful mining, and to be entirely unusual in mining operations, and contrary to the true interests of either party.

Thomas Wynne, Her Majesty's Government Inspector of Mines for the districts of *North Staffordshire, Cheshire*, and *Shropshire*, deposed:—That no alteration in the scaffolding or cages of the *Town Lane Mine* would suffice to enable it to be safely worked

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concurrently with the other mines from the present shaft, and there was no plan left but sinking a separate shaft.

Jacob Higson, mining engineer, deposed:—That he was acquainted with the workings of collieries in *Lancashire* and *Yorkshire*, *Warwickshire*, *North Wales* and *South Wales*, in which districts he was actively engaged in the management; that he was well acquainted with all mining districts in *England* besides; that he was a member of the *Institute of Mining Engineers* (*Midland* and *South Midland*), and also the *North of England Institute of Mining and Mechanical Engineers*, and also consulting engineer to some of the largest collieries in *England*; that he entirely dissented from the opinions expressed in the affidavits filed by the Plaintiffs in this matter as to the question of working the *Cannel Mine* in advance of the *Black Mine*; that, in his opinion, the Defendants ought not, by the rules of good mining, to cease working the *Cannel* in advance of the *Black*, and he denied that by so working, the mine was prejudiced in any way, and he did not know a case where a lessee was compelled to work two seams concurrently, or prevented working the *Cannel* or any other mine in advance, unless where he was positively restricted by the covenants in the lease, and in the absence of such covenants there was no such rule of good mining applicable to all cases as had been suggested on the part of the Plaintiffs; that commerce in that district had invariably regulated the working of the mines, and in most of the instances where lower mines had been worked in advance, it had arisen from the fact that coals from these mines were saleable at that particular time at a higher price than they might have been if the mine had been worked in strict rotation.

There was also specific evidence on the cross-examination of the Defendants' witnesses to the effect that, in these and many other mines, working a lower seam in advance improved the working of an upper seam by loosening the strata, relieving the pressure, and so causing a much larger proportion of coal to come out in large blocks, and diminishing the proportion of slack, and that any countervailing injury could always be prevented by leaving a sufficient interval of time between the workings.

In reply to these affidavits, the Plaintiffs brought forward several witnesses, one of whom, *John Brown*, a mining engineer in

Staffordshire, made the following statement:—"With regard to the working of the *Cannel Mine* before the *Black Mine*, I believe there are some cases where, at a less depth from the surface than that in question, the working of an underlying may not damage an overlying mine, but, on the contrary, render its working more advantageous, that is, where no workings have been made, or headings or levels driven, in the overlying mine; but my experience shews that where headings have been made and pillars of coal left, or workings of any kind made in the overlying seam, any working out of underlying coal, being within fifty yards, or even more, will damage the roads in the upper seam and materially affect the pillars, so that when they are worked out great waste must ensue by the crushing of such pillars; and I believe that by working out the *Cannel Mine* under the roads and pillars in the *Black Mine* the produce of such pillars will be less valuable than if no workings had been made below; and I consider that the Defendants ought to be restrained from continuing such workings."

William Seddon, a *Lancashire* colliery manager, deposed:—"I very much disapprove of working the *Cannel Mine* in advance of the *Black Mine*, as I am confident it would injure the *Black Mine*. When the *Cannel Mine* is worked first, and the subsidence of the whole strata takes place, the shale lying next to the *Black Mine* coal being of a tender nature breaks up into small particles and mixes with the crushed coal, which augments the cost of working and depreciates the coal value. I think the proper way of working these two mines is the working of the *Black Mine* in advance of the *Cannel Mine*, and that, I am confident, would be the most judicious way of dealing with the matter, and would most assuredly conduce to the benefit both of the lessors and lessees."

William Blackburne, mining engineer, deposed thus:—"The *Cannel Mine* ought not to be gotten in advance of the *Black Mine*, and it is contrary to the usual mining custom in this district to work the lower seams before the upper beds of coal have been removed unless it is intended to allow the *Black Mine* to remain ungotten for a period of not less than two or three years after getting the *Cannel Mine*. I say the quantity of house fire coal produced in this *Black Mine* will be decreased, and the levels and airways in the same mine damaged."

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Robert Winstanley, mining engineer, deposed as follows:—"The usual practice and best mode of working mines of coal is to work the higher seams in advance of the lower, especially in the district in which the *Astley* deep pit is situate."

Mr. *Fry*, Q.C., and Mr. *Batten*, for the Plaintiff:—

The Plaintiff in this case is entitled to a mandatory injunction to restrain the Defendants from interfering with the fulfilment of this engagement.

The Court has in various cases exercised a similar jurisdiction: *Lane* v. *Newdigate* (1); *Storer* v. *Great Western Railway Company* (2); *Duke of Beaufort* v. *Morris* (3) (where an order of Lord *Eldon's* in *Morris* v. *Smith* is referred to); *Wilson* v. *Furness Railway Company* (4). In this case, even if specific performance of the covenant could not be enforced, we submit that the Plaintiffs are entitled to an injunction.

By the terms of the covenant in the lease they are bound to work and carry on the mines with the utmost care and ability, and in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on all coal works and collieries with effect. There is no separate demise of each vein; they are demised as an entirety, and therefore the covenant obliges the Defendants to work the several veins as a whole, and not to work one vein separately to the injury of another. One vein or mine cannot, according to this covenant, be worked before another, so as to leave another unworked or ungotten, and if a vein is once begun to be worked the works must be continued.

The evidence adduced on behalf of the Plaintiffs is conclusive as to the custom of the country, shewing that the proper course of mining in that part of the country where the seams are not separated by a very great interval, is to work the same together, or to work the upper seam in advance of the seam which is next below it, and not to work the lower seam in advance of the upper seam. The Defendants' evidence, including the report of the mining engineers, Messrs. *Higson* and *Cross*, cannot be relied on.

(1) 10 Ves. 192.
(2) 2 Y. & C. Ch. 48.
(3) 6 Hare, 340, 342.
(4) Law Rep. 9 Eq. 28.

According to the evidence it is contrary to the practice of this district for the Defendants to work the *Black Mine* and the *Cannel Mine* without working the *Town Lane Mine*. The pretext that the mode of working adopted by the Defendants was necessary for the safety of the mine cannot be established. They have no right to remove the machinery for working the *Town Lane Mine*, or to allow the roads or airways in the *Town Lane Mine* to remain choked up.

On the whole case, we submit that the Plaintiffs have established a good ground for the interference of the Court.

Sir *R. Baggallay*, Q.C., and Mr. *Hemming*, for the Defendants, were not called on.

SIR G. JESSEL, M.R.:—

The case has been very elaborately argued. I look on this bill as a mere experiment by an experienced equity draftsman, who was perfectly aware from the first that the kind of agreement in this lease as to working the mines was not the sort of agreement of which the Court, according to the limits imposed by the authorities on its jurisdiction, could give specific performance; and, being well aware of that, he exercised his ingenuity to see if he could not, by means of an injunction, obtain what in reality was equivalent to specific performance. I repeat the bill does very considerable credit to Mr. *Batten* (if he will allow me to say so), and to his ingenuity. But unfortunately it fails in substance the moment you admit you cannot get specific performance, as you must here.

By a lease granted in November, 1856, Mr. *Astley* demised certain mines, together with a pit and depôt, in words which are not immaterial; they were as follows:—"All such parts and portions, or so much and such parts of all those several mines, delphs, veins, and beds of coal and cannel lying and being under the lands and grounds of *F. Astley* and *G. J. Newton*, or either of them as were not then leased, and called the *Black Mine*, the *Town Lane Mine*, and the *Peacock Mine*, with certain exceptions therein mentioned." The word "mine" is clearly there used in its primary sense of "vein," and each mine is named separately.

Then there is a demise of the pit called "*Astley's New Pit*," and

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also, by way of demise and not of exception, with its steam engines, engine-houses, workshops, and other buildings.

[His Honour then referred to other provisions of the lease before the covenant as to working the mines, observing that, if the lease stopped there, the lessees would have the power, but not an obligation cast upon them, to work any of the demised mines, or none of them if they thought fit. He then referred to a covenant to sink the *Astley* pit to the depth of 300 yards lower than its depth at the time of the lease, and then read the covenant upon which the decision in the case mainly turned.]

The first question which I have to decide is, What does this covenant mean? At the outset we find the Plaintiffs coming into this Court to ask the Court to give effect to a covenant, and being compelled to say it cannot mean what it says. The literal meaning is as absurd as possible, and therefore I must try to find a secondary meaning.

If ever there was a case for an injunction, as distinct from the remedy at law, I suppose it must be founded on a clear contract between the parties, and certainly the Plaintiffs, who come here with such an admission as this, have not a very clear contract. Let us see if the Plaintiffs can have the benefit of the literal construction. In the first place, are the lessees to work all the mines at all times during their term? That is impossible, for these reasons: first, they could not work the *Town Lane Mine* while they were sinking the other. The pit was wanted for the purpose of being used for the workmen who were going further down, and for a very considerable time that must be so. In the next place, it is impossible to work the other mines until you get at them, and the very lease, on the face of it, shews you cannot get at them without sinking a pit, and though all parties must have known that with a pit of this size it was impossible to work all these mines, they do not seem to take that into account, but insist on the working of the *Town Lane Mine.*

For these reasons it is manifestly impossible to adopt the literal reading. But there is another reading, and that is this, that the covenant to work the mines at all times in an effectual manner would compel the lessees to work, although they found faults which might render it excessively expensive to work, and which it

is very unusual to call upon a lessee to work through; and it would also compel them to work a vein at a loss, although that would be to work all the mines at a loss. And this would be particularly so if they were compelled to work the upper vein and *Peacock's* mine; they might also be obliged to work other seams which are quite unworkable at a profit. But it does not stop there, because that would compel them to go on working after the coal had deteriorated in value, and could not be sent to market at a profit. It would be a most unreasonable and absurd covenant. I am not surprised, looking at it that way, that the counsel for the Plaintiffs felt themselves compelled to abandon the literal reading. Then they had to suggest some other reading, and what they suggested was this, that if you begin to work a vein you must continue to work it; but I must say I cannot find in the covenant any arrangement of that sort, and if that were so, I do not know what it would lead to. It is mere conjecture. But, independently of the several reasons I have mentioned, others would apply to that reading as well; for instance, the *Town Lane Mine* was not at work, but for the reasons I have mentioned it could not continue working during the sinking of the pit; and therefore the covenant could not be held to apply to that; and it appears to me that I am not at liberty to use this covenant as a covenant for continuous working at all, though it might apply to this, that when you do work you shall work in the right way.

But suppose this difficulty removed, the Plaintiffs ask for an injunction on this point to restrain the working of the other colliery, while the one which the Defendants have begun to work remains unworked. It appears to me that that has no connection whatever with the covenant. There is no covenant not to work any unless you work all, which is what the Plaintiffs want. The only covenant they have is, to work all, but the right to work any is under the demise. The lessees have a right, under the previous words, to work any of the mines. You must find a restrictive covenant to cut down the legal effect of the demise, and there is none.

A demise of twenty houses, with a covenant to keep all of them in repair, does not prevent the lessee repairing all but one; it adds, no doubt, an additional obligation on him; but could the lessor

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apply to the Court to restrain him from repairing nineteen of them until he repaired the twentieth? Is there any difference between that case and this?

It was said when I put this in argument, that there was a connection between the mines here, there being a common pit. But in the case of a single house, with a common staircase and series of flats, and a covenant to repair, could you say that because the tenant was repairing the roof and not the ground floor, that you could apply to the Court of Chancery for an injunction against him for not repairing the roof until he had repaired the ground floor? It is the same thing here. This is not an affirmative covenant which includes a negative. There is a judgment of Lord *Hatherley*, when Vice-Chancellor, in the well-known case of *Pollard* v. *Clayton* (1), which bears on this point.

Whilst I am upon this covenant I may mention something about another point. It was said that there was a vein called the *Cannel Mine*, which ought not to be worked in advance of the *Black Mine*. But when you come to look at it, in reality, the complaint is, not that you work the *Cannel Mine* in advance, but that you do not work the *Black Mine* fast enough. What is said in effect is, that if the Defendants had worked the *Black Mine* as fast as the *Cannel Mine* the Plaintiffs would have been content; but of course they cannot get specific performance of that. They therefore ask to stop the Defendants from working the *Cannel Mine* till the *Black Mine* is worked up to it. Not being able to compel the working, they seek by the form of an injunction to stop the working of another mine—the *Cannel*—which the Defendants have a perfect right to work.

It appears to me, looking at the covenants, that I cannot grant the injunction which the Plaintiffs ask. I might well stop there, but I do not think it would be quite satisfactory, because a great deal of evidence has been gone into as to the facts, and it is necessary I should advert to this in order to make the case intelligible. The first complaint, as I have said before, is, that the *Town Lane Mine* has been shut up. Now, if I am right in what I have said, the Plaintiffs cannot get any injunction to compel the Defendants to shut up the *Cannel Mine* till the other is worked.

(1) 1 K. & J. 462. 1 Jur. N.S. 342

But there is another ground alleged by the Defendants, which is admitted by the Plaintiffs to be an insuperable difficulty if it is true in fact. The Defendants say it is impossible, with a pit of the present size, having regard to the requirements now made by the Legislature with regard to the safety of the workmen in deep mines, to work the *Town Lane Mine* because there would not be sufficient ventilation. If that is so, even the Plaintiffs admit the Court ought not to interfere by injunction.

In March, 1870, there was a frightful explosion in this mine, and many men were killed. The Government Inspector interfered, and he said in effect: "Your pit is not large enough; the upcast shaft through the *Town Lane Mine* is not large enough to work the *Town Lane Mine*, and to ventilate the other; upon considering the whole matter, I am of opinion the best thing to be done is to shut up the *Town Lane Mine*, and go on with the other veins."

This seems to have been rather unpalatable advice to the Defendants, and they did not immediately act on it, but they called in two other engineers—Mr. *Higson* and Mr. *Cross*—to advise what was best to be done; and in September, 1870, Messrs. *Higson* and *Cross* made a report, which report puts it very strongly in the same way as did the Government Inspector. [His Honour then read the report.]

It is suggested by the Plaintiffs that this evidence is not to be depended on, and that their witnesses' evidence is. If the Defendants' evidence is the correct version, the effect of an injunction would be to shut up all the mines, and leave the Defendants subject to a dead rent.

Now I will consider the evidence on this point, but before doing so, I must say how the Plaintiffs contest it. They contest it by producing the evidence of some experts, whose evidence was met by at least as many experts on the part of the Defendants. As to this, I may say what I think I have often said before, that in matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction. A dishonest man, knowing he could not be punished, might be inclined to

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indulge in extravagant assertions on an occasion that required it. But that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.

Now it is natural that his mind, however honest he may be, should be biassed in favour of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.

Accordingly, we find in doubtful cases the most remarkable results. Take this case: there are two questions; one, whether sufficient ventilation exists for three mines; the other, whether the *Cannel Mine* ought or not to be worked in advance of the *Black Mine*. Well, we have the witnesses giving evidence for the Plaintiffs' view of the matter, or the Defendants' view, according as they are sought out and paid by each. It is very natural, and just what one would expect, but it leads one to distrust their evidence. There is also this to be said against them, namely, that their evidence is not the evidence of fair professional opinion. The men are selected according as their opinion is known to incline.

Suppose a person wants to sell a house, and as he wants a very high value put upon it, he sends to ten valuers, and out of these he selects the three who have put the highest value on the house. The purchaser wants a very low value, and selects out of a number of valuers three of the lowest. Each set of valuers values high or low, according to the requirements of the person who employs them. I have known the same sort of thing done even as regards medical evidence. The consequence is, you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.

That being so, when I have expert evidence I am, as I said before, very distrustful *à priori;* and I am anxious to ascertain the character of the experts, and to see the position they occupy.

In this case I have this circumstance, that of the five experts for the Plaintiffs, four are ordinary experts, the fifth is an agent for the Plaintiffs and in their regular employment, and that being more continuous, his bias would be rather greater. When I look to the Defendants' witnesses, three of them are of a very different character. The first, *Wynne,* is not in the ordinary sense an expert witness at all. He is the Government Inspector of Mines, and was not paid for this purpose. The advice he gave was given in the course of his employment as Government Inspector, and with a view to the safety of the mine. It was given before there was any dispute. The advice he gave was given long ago, and it was advice upon which the Defendants were not willing in the first instance to act. As regards *Higson* and *Cross,* although not of such good position as *Wynne* in these respects, they are in a better position than ordinary experts. They were called in to advise the Defendants before any contest arose. Their opinion was given in the shape of a formal report, and not with a view to the success of the suit. They are parties interested, in the sense of acting for the Defendants, to assist them in giving *bonâ fide* advice for the more advantageous conduct of the mine, but not to assist them in the litigation. Therefore I look upon their evidence as much better and more to be depended on than ordinary expert evidence.

If, therefore, the witnesses were all equally positive, I certainly should prefer the evidence of the Defendants; but when I come to examine the Plaintiffs' evidence, I find the evidence is not nearly so positive as that of the Defendants. As regards this matter of the ventilation, the majority of the witnesses say there would be sufficient air if the passages in the lower mines, especially the *Black Mine,* were constructed on a larger scale.

On the whole, I am satisfied, on the balance of testimony, that the Defendants are right on this point, and that it would be dangerous to continue the working of the *Town Lane Mine,* together with the *Black Mine* and the *Cannel Mine.* Therefore I ought not to interfere by injunction, and on this point the Plaintiffs' case fails.

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The next point taken was that the Plaintiffs were entitled to an injunction to prevent the *Town Lane Mine* "remaining choked up, or otherwise than open and in proper working order."

Now the jurisdiction of this Court does not extend to the performance of covenants to repair. It is clear I cannot grant an injunction that the Defendants shall not be at liberty to work the other mine till they put the *Town Lane Mine* in repair.

The other part of the case that was seriously fought was this: It appears that about some fifty yards below the *Black Mine* there is a vein of coal of about 2 ft. 3 in. in thickness, which is a very profitable mine to work at the present time, and the Defendants are working it (as it is termed) in advance of the *Black Mine*. One of the witnesses says they took 11,000 tons a week out of the *Cannel Mine*, and only 600 tons out of the *Black Mine*, so that it would appear that the *Cannel* coal is worked more rapidly than the *Black Mine* coal, and that the *Cannel Mine* has been almost exhausted, whilst the *Black Mine* is very little worked; and the allegation is, that this is contrary to good mining. An admission was made that it was not contrary to good mining to work a coal mine as they are working the *Cannel*, provided they did not work the *Black Mine* at all—but that concedes the whole case, if I am right in the construction I put upon the covenants, that if they are entitled to work the *Cannel Mine* alone, they are not the less entitled to work it because they work the *Black Mine*. If they work it without working the *Black Mine*, they may equally work it if they do work the *Black Mine*.

But it is said, if you work the *Black Mine* at the same time as the *Cannel Mine*, the roads and passages of the *Black Mine* will be injured by reason of the taking away of this additional quantity of material, which will cause a subsidence and injury to the roads.

That may be so, but still that does not give a right to injunction.

The injury done is an injury done to the working of the *Black Mine*. Either you are working the *Black Mine* properly, or you are not; but whether so or not, for that is the point, the Plaintiffs admit if you work the *Black Mine* fast enough no injury will happen; or rather their complaint is that the *Black Mine* is worked improperly by not being worked away fast enough.

Suppose it was a negative instead of an affirmative injunction that was asked. You could not ask for an injunction to restrain them from working the *Cannel Mine*, and on that ground the Plaintiffs must fail. As regards the *Black Mine*, you cannot have an injunction for not working fast enough. There is no form of injunction applicable to it, and therefore the remedy by injunction is simply out of the question.

But passing from that, let us just look a little at the fact. Now the fact in dispute, and the issue to be decided, is this: whether working the two mines or seams together, but working the lower mine in advance, is in accordance with the common mode and usual practice of carrying on coal works or collieries with effect, which refers of course to that district; because, with regard to usual practice, we know that it varies very much with the nature of the mine and the nature of the fuel which is extracted; the practice of one district has little or no application to the practice of another. Now on this there has been a great deal of evidence, and I must say that the evidence is overwhelming in favour of the Defendants, and that is evidence not merely of opinion but of fact. [His Honour then reviewed the evidence of the Plaintiffs' witnesses and the evidence of the Defendants' witnesses, and said that while the one set of witnesses were vague and unsatisfactory, the other gave conclusive evidence, founded on specific facts, in favour of the Defendants' mode of working the mines, and continued:—]

The result is, that it is proved that the mode of working adopted by the Defendants (whether the best possible mode I do not say) is the common mode and usual practice, and consequently there is no ground for accusing them of a breach of contract, or of doing anything which entitles the Plaintiffs to come to this Court for an injunction.

The bill must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *E. H. Barlee*, agent for Messrs. *Buckley & Son, Ashton-under-Lyne.*

Solicitors for the Defendants: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman, & Co., Manchester.*

Applied. Re HOWLETT (*decd.*). [1949] 2 All E.R. 490.

M. R.

1874

Jan. 13, 14, 15.

HOWARD *v.* EARL OF SHREWSBURY.

[1872 H. 133.]

Settled Estates—Act of Parliament, Construction of—Recitals—Parcels—General Words—Lands included in Schedule—Legal and Equitable Estate—Infant Plaintiff—Practice—Ejectment Bill.

Where an Act of Parliament giving powers of sale and exchange over settled estates contained a recital of the object of the Act, which was restricted in terms to such settled estates, and then vested in trustees all and singular the lands in certain counties, limited by a settlement and former Act of Parliament, which were described in the schedule, together with the appurtenances belonging thereto, or therewith occupied or known, as part thereof:—

Held, that lands not included in the settlement or former Act, though described in the schedule and in the same occupation, did not pass.

Where another Act of Parliament giving powers of sale and exchange over settled estates, expressly vested in the trustees for sale all the scheduled lands (which comprised other lands besides the settled estates), and declared that until sale the lands should be enjoyed by the persons who would have been entitled but for the Act, and that the lands to be purchased should be conveyed and settled to the uses and subject to the powers, restrictions, &c., to which they would have been subject but for the Act:—

Held, that the words were to be read distributively, and that the person who would have been entitled to the unsettled lands before the Act was still entitled in equity.

Where an infant is entitled both at law and in equity to real estate as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-Plaintiffs.

Crowther v. *Crowther* (1) not followed.

THE Plaintiffs in this suit were the devisees under the will of *Bertram*, seventeenth Earl of *Shrewsbury*, namely, *Edward George* Baron *Howard* of *Glossop*, the Earl of *Gainsborough*, Lord *Edmund Bernard Howard*, an infant, by the Duke of *Norfolk*, his brother and next friend, and *Francis Edward Howard*, also an infant, by his next friend.

The Defendants were the Earl of *Shrewsbury* and the trustees of the *Shrewsbury* settled estates, namely, *John Gilbert Talbot* and *Alfred Charles Duncombe*.

The object of the suit was to obtain a declaration by the Court

(1) 23 Beav. 305.

that certain estates (called for convenience properties numbered respectively 1, 2, 3, and 4) passed under the devise in the will of the said Earl *Bertram*, and that the Plaintiffs were entitled to the same accordingly.

By indentures of settlement of the 3rd and 4th of March, 1718, the estates therein described were settled to the use of *Gilbert* Earl of *Shrewsbury*, with remainders to his first and other sons in tail, with remainders over.

By an Act of Parliament, 6 Geo. 1, c. 29, passed in 1719, certain hereditaments therein described were settled to the use of *Gilbert* Earl of *Shrewsbury* for life, and after his decease to the use of his first and other sons successively in tail male, and for default of such issue to the use of all and every person and persons, being issue male of the body of the first Earl of *Shrewsbury*, to whom the title, honour, and dignity of Earl of *Shrewsbury* should, by virtue of the letters patent of creation of the earldom, descend, successively in tail male, so as to be annexed to and to descend with the earldom. And it was enacted that no person becoming entitled to an estate of inheritance in such hereditaments by virtue of the Act should be at liberty to alienate the same, provided always that no person to whom any estate of inheritance of or in the premises, or any part thereof, should thereafter come, descend, or accrue by means of the said Act of Parliament, who should within six months after attaining the age of eighteen take the oaths and subscribe the declaration prescribed by the Act 30 Car. 2, c. 2, and should thenceforth continue a Protestant until he attained the age of twenty-one years, should, after attaining such age and while he continued a Protestant, be disabled from alienating the hereditaments thereby settled.

Gilbert Earl of *Shrewsbury* died in 1743, and was succeeded in the title and estates by *George* Earl of *Shrewsbury*.

In 1762 two closes, called *Hocketts*, in *Benchfield* in *Berkshire*, were purchased by and conveyed to the said *George* Earl of *Shrewsbury* by indentures dated the 22nd and 23rd of February, 1762. This was property No. 1.

In 1770 certain lands at *Fernhill* (in lieu of which, under an inclosure award dated the 9th of July, 1770, certain other lands at *Chipping Norton* and *Salford* were afterwards awarded) were

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purchased with moneys belonging to *George* Earl of *Shrewsbury*, and were conveyed by indentures of the 1st and 2nd of February, 1770, to *John Ingram*, his confidential solicitor, as a trustee for the said Earl. This was property No. 2.

In 1782 a piece of land in *Benchfield*, called *Astel Mead*, was purchased by the said *George* Earl of *Shrewsbury*, and conveyed to him by indentures of the 17th and 18th of December, 1782. This was property No. 3.

The said *George* Earl of *Shrewsbury* died in 1787 intestate as to real estate, leaving his nephew *Charles Talbot*, who became the fifteenth Earl, his heir at law, who thereupon became entitled to the lands purchased in 1762 and 1782, for an estate of inheritance in fee simple, and to the lands purchased in 1770 for an equitable estate in fee simple.

By a private Act of Parliament (43 Geo. 3, c. 40), after reciting that certain parts of the estates settled by the settlement of the 4th of March, 1718, and the said Act of the 6 Geo. 1, c. 29, consisted of undivided parts and shares, and that others were dispersed in many parcels, and lay in a number of parishes and places very distant from each other, in the several counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, and were remote and at a great distance from the principal estates of the said *Charles* Earl of *Shrewsbury* in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, and from the family seat of *Heathropp*, in the county of *Oxford*, and that the management and receipt of the rents of the remote parts of the said estate was, by reason of such their situation, attended with additional expense and much inconvenience, and that those parts of the said estates in the said counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, would sell to great advantage, and that it would therefore be greatly for the benefit of the said Earl and those entitled in remainder in the said settlement and Act of Parliament if all the said estates situated in the said counties of *Salop*, *Chester*, *Berks*, and *Wilts*, and certain detached parts of the said estates in the said county of *Oxford* were sold, and reciting that it was desirable to purchase other estates in the said counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, which lay more convenient and advantageous to be enjoyed with the bulk of the Earl's estates in those counties, to be settled as nearly

as might be to the same uses, yet that the said Earl was deprived of the powers by law incident to an estate tail, and the salutary purposes before-mentioned could not be effected without the aid and authority of Parliament, It was thereby enacted as follows: "That all and singular the manors or lordships, messuages, farms, lands, titles, tenements, hereditaments, and premises, and undivided parts and shares of manors, &c., situate, lying, and being in the several counties of *Salop, Chester, Berks, Wilts,* and *Oxford,* limited and settled by the said indentures of the 3rd and 4th of March, 1718, and the said Act of Parliament (6 Geo. 1, c. 29), which are particularly set forth and described in the schedule hereunto annexed, together with all and singular houses, outhouses, &c., to the said manors or lordships, messuages, farms, lands, and hereditaments belonging, or in anywise appertaining, or therewith used, occupied, possessed, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, shall, from and after the passing of this Act, be vested in, settled upon, and the same are thereby vested in and settled upon" the trustees therein named, freed from the restrictions against alienation, upon trust, with the consent of the tenant for life, and in case of his minority then by the authority of the trustees, to sell the same as therein mentioned, and to lay out the money arising from such sale under the direction of the Court of Chancery, and with the consent of the tenant for life, in the purchase of other lands to be settled to such of the uses and subject to such of the provisions to which the lands sold were then subject. And the Act directed the interim investment of purchase-money, and that the tenant for life should apply to the Court for payment thereof on the completion of any new purchase.

It was admitted that the hereditaments comprised in the indentures of the 22nd and 23rd of February, 1762, were comprised in the schedule to the said Act, being included with other hereditaments under the description of a farm called *Pococks,* and a mill called *Benchfield Mill,* and that the hereditaments comprised in the indentures of the 17th and 18th of December, 1782, were comprised in such schedule, being included with other hereditaments in a farm described as *Pound's Farm* and *Sargroves,* and the Defendants contended that these hereditaments (properties 1 and 3) and

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the legal estate therein, were at the time of the suit vested in the trustees of the Act upon the trusts thereof.

In pursuance of the last-mentioned Act, part of the estates mentioned in the schedules thereto were sold, and the money arising from the sale was paid into the bank, and as in 1824 the then trustees under the Act entered into a contract with *Charles*, the fifteenth Earl of *Shrewsbury*, for the purchase of certain hereditaments in *Cheshire* and *Staffordshire*, for the sum of £1000, which agreement was confirmed by the Court of Chancery, and was carried into effect after the death of *Charles* Earl of *Shrewsbury* by an indenture of the 2nd of November, 1832, whereby, in consideration of the said sum of £1000, *John*, the then Earl, conveyed all his estates situated in the county of *Worcester*, described in the schedules to the said indenture, to the trustees under the said Act.

The schedules annexed to the indenture of the 2nd of November, 1832, did not comprise the lands which were comprised in the indentures of the 22nd and 23rd of February, 1762, the award of the 9th of July, 1770, the indentures of the 17th and 18th of December, 1782, or any of them; but three closes called *Oldman's Land*, *Quarrell's Meadow*, and *Marl Pit Pieces*, in the county of *Worcester*, and containing eleven acres (property No. 4), which had been bought by the Earl of *Shrewsbury*, were included in the general description of all the lands in the county of *Worcester* of which the said Earl *John* was seised.

The Plaintiffs alleged that the lands comprised in the last-mentioned indenture were of much greater value than £1000.

By a private Act of Parliament (6 & 7 Vict. c. 28), after reciting the Act of 6 Geo. 1, c. 29, and also reciting that *John* Earl of *Shrewsbury* was the heir male of the body of *George Talbot*, son of *Gilbert Talbot*, and was the tenant in tail male in possession of the settled manors, lands, and premises, and reciting that several manors and other hereditaments in the counties of *Oxford*, *Chester*, *Salop*, and *Worcester*, described in the second schedule to the Act (and in the Act referred to as part of the settled estates), were much dispersed and detached from the principal estates, and that the same might, from their situation and other circumstances, be sold to advantage, and reciting that it would be for the benefit of *John* Earl of *Shrewsbury* and those who might succeed to the settled

estates if the said manors and hereditaments should be vested in trustees in trust to sell the same, with a provision for investing the moneys to arise thereby as in the said Act mentioned, it was enacted that all and singular the manors or lordships, lands, messuages, farms, and hereditaments, particularly mentioned and described in the second schedule to the Act, should be ever thenceforth vested in the trustees therein named, freed and discharged from all subsisting uses, trusts, and limitations, upon trust to sell the same in manner therein mentioned.

And it was thereby provided that "all moneys to arise from any such sales shall be paid into the Court of Chancery, and shall be laid out in the purchase of other lands which shall be conveyed, settled, and assured to the uses, and with, under, and subject to the powers, provisoes, conditions, limitations, restrictions from alienation, declarations and agreements to, with, under and subject to which the said lands hereby vested in trust as aforesaid would have stood limited and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased, and other circumstances, will admit." And it was thereby provided that "such moneys, until invested in the purchase of lands, shall be invested in the manner herein mentioned, and the profits paid to such person or persons respectively as would have been entitled to receive the rents and profits of the lands directed to be purchased in case the same had been purchased pursuant to this Act." And it was further enacted as follows: "that in the meantime, and until such sale or sales as aforesaid, the manors and hereditaments hereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought now to have held and enjoyed the same in case the same premises had not, by this Act, been so vested in trust as aforesaid.

The three closes called *Oldman's Land, Quarrell's Meadow,* and *Marl Pit Pieces,* also the land comprised in the award to *John Ingram* of the 9th of July, 1770 (properties Nos. 2 and 4), were comprised in the schedule to this Act.

John Earl of *Shrewsbury,* by his will, dated the 21st of August,

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1845, devised all his real estate to trustees upon trust for sale, with a right of pre-emption in favour of the Earl of *Shrewsbury* who should succeed the testator.

John Earl of *Shrewsbury* died in 1852, and was succeeded by *Bertram*, the seventeenth Earl, who became tenant in tail of the estates of which his predecessor had been tenant in tail, and the right of pre-emption given to him by the last-mentioned will was exercised in his behalf by the Court of Chancery.

By two disentailing deeds, dated respectively the 17th of April, 1855, and the 31st of May, 1856, the said Earl *Bertram*, Earl of *Shrewsbury*, barred all estates tail vested in him, and limited the hereditaments, subject to such estates tail, to himself in fee.

The said Earl *Bertram*, by his will, dated the 3rd of April, 1856, devised all his hereditaments and real estate to the use of trustees for the term of 1000 years, upon certain trusts, and, subject thereto, to the use of Lord *Edmund Bernard Howard* (the infant Plaintiff) for life, with remainder to the use of each of his sons who should be born in the testator's lifetime for life, with remainder to the use of his first and other sons successively in tail male, with remainders over in favour of Baron *Howard* of *Glossop* and others in the said will named.

Earl *Bertram* died on the 10th of August, 1856, and was succeeded by *Henry John* Earl *Talbot*, who died on the 4th of June, 1868, and was succeeded by the Defendant, *Charles John* Earl of *Shrewsbury* and Earl *Talbot*.

A former suit of *Howard* v. *Earl of Shrewsbury* (1) was instituted by the present Plaintiffs, as devisees under the will of Earl *Bertram*, against *Henry*, the then Earl of *Shrewsbury*, claiming the estates which were settled by the indenture of the 2nd of November, 1832, on the ground that the transaction was a fraud upon the Act, and that therefore the Parliamentary restraint on alienation did not attach.

In 1866 the Master of the Rolls (Lord *Romilly*) decided that the transactions of 1832 were valid under the Acts, and dismissed the Plaintiffs' bill. The case came by appeal before the Lord Chancellor (Lord *Chelmsford*), Lord Justice *Turner*, and Lord *Cairns*, who, on the 17th of July, 1867, reversed the decision of the Master of the

(1) Law Rep. 3 Eq. 218; Ibid. 2 Ch. 760.

Rolls, and made a decree declaring that the £1000 was not well or effectually vested in the purchase of real estate within the meaning of the Act, and that the estates comprised in the indenture of the 2nd of November, 1832, were not thereby made subject to the restriction on alienation contained in the Act of 6 Geo. 1, c. 29; that the sum of £1000 constituted a charge on the lands comprised in the indenture of the 2nd of November, 1832, other than the eleven acres (*Oldman's Land*, *Quarrell's Meadow*, and *Marl Pit Pieces*), but that this should be without prejudice to any right which the Plaintiffs might have in such eleven acres, and that, on payment of the sum of £1000 into Court, the Plaintiffs were entitled to hold the lands, other than the said eleven acres, freed from any claim in respect of the said £1000.

The Plaintiffs, the devisees under the will of Earl *Bertram*, filed their bill, alleging the title to the estates under which they claimed against the present Earl of *Shrewsbury* and the trustees as Defendants.

The Defendants contended that the three closes and the hereditaments comprised in the award of the 9th of July, 1770 (or properties Nos. 2 and 4), and the legal estate therein, were vested in the trustees under the Act of 6 & 7 Vict. c. 28, and that the hereditaments comprised in the indentures of the 23rd of February, 1762, and the 18th of December, 1782 (or properties Nos. 1 and 3), and the legal estate therein, were now vested in the same persons under the Act of 43 Geo. 3, c. 40.

The Plaintiffs submitted that such hereditaments respectively were comprised in such Acts respectively, under the mistaken belief on the part of the persons procuring and assenting to such Acts respectively that such hereditaments respectively formed part of the said settled estates, and further, that such hereditaments should be deemed and considered as not passing under such Acts so as to vary the equitable estates and interests therein, and that the same were in equity the property of the said *John* Earl of *Shrewsbury*, and passed by his will and the will of Earl *Bertram*, and were now subject to the uses and estates limited and created by the last-mentioned will. The Plaintiffs submitted further that the Defendants *John Gilbert Talbot* and *Alfred Charles Duncombe*, according to the true construction of the said Acts, and the circumstances stated in

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the bill, were trustees for all persons, including the Plaintiffs, interested under the said will of Earl *Bertram*.

The Plaintiffs prayed a declaration that the said three closes called *Oldman's Land*, *Quarrell's Meadow*, and *Marl Pit Pieces*, and the hereditaments comprised in the indentures of the 23rd of February, 1762, the award of the 9th of July, 1770, and the indenture of the 18th of December, 1782, became, upon the decease of Earl *Bertram*, subject to the uses and trusts by his will declared of all the manors and real estate, being freehold of inheritance, which he had any right or power to dispose of by his will, and that the rents of all such hereditaments respectively (including the said three closes) ought to be had, received, and taken by or for the benefit of the person or persons entitled thereto under or by virtue of the same will, and for consequential relief.

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., and Mr. *Ingle Joyce*, for the Plaintiffs:—

The Plaintiffs, as devisees under the will of Earl *Bertram*, have a clear equitable interest in the lands in question.

As regards the lands described for convenience as Nos. 1 and 3, the title to them depends on the construction of the Act 43 Geo. 3, c. 40. The recitals in that Act shew that it was only intended to affect the *Shrewsbury* settled estates, and though the lands in question were thrown into farms which are described in the schedule to the Act, yet the operative words must be controlled by the recitals, and as they pass nothing except what was included in the original settlement, the Act of Geo. 1, and the schedule, these lands cannot be held to have passed to the trustees. The general words are not sufficient to include them. These lands, therefore, belonged to *John*, fourteenth Earl of *Shrewsbury*, and passed under his will to Earl *Bertram*.

The lands described as Nos. 2 and 4 are affected by the Act of 6 & 7 Vict. c. 28, and it must be admitted that they are described in the schedule, and that the legal estate passed to the trustees for sale. But these trusts not having been exercised, the equitable interest remained in the person who, but for that Act, would have been entitled to these lands, and thus devolved on Earl *Bertram*.

Where a private Act of Parliament only affects the legal estate

in any lands, the person entitled to the equitable estate is entitled to recover in equity as against a person in wrongful possession.

Thus, in *Jackson* v. *Innes* (1), it was held that, on a mortgage, the equity of redemption followed the prior uses unless there was a clearly implied intention to change them and create a new settlement.

The way in which the Court deals with private Acts of Parliament is shewn in *McKenzie* v. *Stuart* (2), where a private Act of Parliament contained a recital that certain debts were due, and authorized a sale of estates to pay them; the remainderman was afterwards allowed by the House of Lords to prove that some of the debts were fictitious, being got up by the tenant for life of the estates. So in *Chapman* v. *Brown* (3), where a private Act of Parliament recited that one was tenant for life of certain estates, it was nevertheless held that he was tenant in tail.

The Plaintiffs may properly sue in equity without establishing their legal title by ejectment to those lands in which they claim to be entitled both at law and in equity.

Mr. *Joshua Williams*, Q.C., Mr. *Fry*, Q.C., and Mr. *Kekewich*, for the Defendant the Earl of *Shrewsbury*:—

Assuming that the lands in question did not pass by the private Acts of Parliament, and though one of the Plaintiffs is an infant, we contend that, as regards lands 2 and 4, in which he claims both a legal and equitable interest, that a Plaintiff cannot sustain a bill in equity against an intruder on the property without first establishing his legal title by ejectment.

This was laid down by Lord *Romilly* in *Crowther* v. *Crowther* (4), where it was held that the rule that an infant can file an ejectment bill did not apply where the infant had been in possession personally, or by his guardian or an agent, and the estate had been sold by a title adverse to the infant.

But we contend that the lands in question did not pass under these Acts to Earl *Bertram*, under whom the Plaintiffs claim. The properties numbered 1 and 3 were dealt with by the Act of

(1) 1 Bli. 104.
(2) 5 Cru. Dig. 23.
(3) 3 Burr. 1626.
(4) 23 Beav. 305.

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43 Geo. 3, c. 40. They are mentioned in the schedule, and the words "occupied as part or parcel or member thereof" in the general words would be sufficient to include them, as they were in fact jointly occupied with other farms. They became vested, therefore, under that Act in trustees for sale, and were dealt with as part of the settled estates.

Then as regards parcel 2, which was included in the award, the legal estate is still outstanding in the heir of *Ingram*, in whom the property was vested.

The Act of 6 & 7 Vict. c. 28, dealt with Nos. 2 and 4, and it is not disputed that they were included in the schedules and became vested in the trustees.

Under these circumstances no part of the property in question passed to Earl *Bertram;* and even if the Plaintiffs' construction of the private Acts of Parliament is correct, the infant Plaintiff cannot recover in equity.

Mr. *Fischer*, Q.C., and Mr. *Agnew*, for the trustees.

The following cases were also referred to: *Roberdeau* v. *Rous* (1); *Blomfield* v. *Eyre* (2); *Morgan* v. *Morgan* (3); *Thomas* v. *Thomas* (4); *Earl of Shrewsbury* v. *Scott* (5); *Bullock* v. *Fladgate* (6); *Wheeler* v. *Horne* (7); *Giffard* v. *Williams* (8); *Bailey* v. *Lloyd* (9); *Walsh* v. *Trevannion* (10).

SIR G. JESSEL, M.R.:—

The substantial question to be decided in this cause is this—when I say question I might almost say a series of questions,—whether certain pieces of land which, being held under four different titles, are conveniently described as 1, 2, 3, and 4, belong to the persons entitled to the lands of *Bertram*, the seventeenth Earl of *Shrewsbury*, under the devise in his will of his estates, or whether those lands belong to the present Earl of *Shrewsbury* as tenant in tail under what I will call the *Shrewsbury* settle-

(1) 1 Atk. 543.
(2) 8 Beav. 250.
(3) 1 Atk. 489.
(4) 2 Ir. Eq. Rep. 109.
(5) 6 C. B. (N.S.) 1.
(6) 1 V. & B. 471.
(7) Willes, 208.
(8) Law Rep. 5 Ch. 546.
(9) 5 Russ. 330.
(10) 16 Sim. 178.

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ment. The second question, or series of questions, is, whether, assuming the Plaintiffs, that is, the persons entitled under Earl *Bertram's* will, to be entitled both at law and in equity to the lands in question—whether the remedy, if any, is not at law; secondly, assuming it to be in equity, whether the allegations of the bill are so framed, or the prayer so framed, or both so framed, that the Plaintiffs can have any relief in this suit.

I will first of all consider the real questions, and then I will consider whether any of these technical grounds prevent my doing justice between the parties—of course assuming that I am right in my decision of the real questions.

These four properties are affected by different instruments, and as their titles are to a certain extent distinct, it is as well to keep them separate in considering the effect of the legal instruments which I have to construe. Now two of the properties, which are called No. 1 and No. 3, are not alleged to be affected by any Act of Parliament except an Act of 43 Geo. 3, c. 40. The two other properties, which are called No. 2 and No. 4, are not alleged to be affected by any Act of Parliament except the Act 6 & 7 Vict. c. 28.

As regards the properties 1 and 3, which I will deal with first, No. 1 was bought in the year 1762 by *George*, the fourteenth Earl of *Shrewsbury*, and was conveyed to him in fee. No. 3 was bought by the same Earl of *Shrewsbury* in December, 1782, and was also conveyed to him in fee. Now that Earl of *Shrewsbury* was tenant in tail in possession of very large property, which I will call, for the sake of convenience, the *Shrewsbury* settled estates. An Act of Parliament had been obtained (6 Geo. 1, c. 29) by which these settled estates had been annexed to the Earldom with a proviso by which any Earl becoming a Protestant (that is the effect of it) was entitled to alienate them. The Earls of *Shrewsbury*, being then Roman Catholics, were not so entitled; but if one of them became a Protestant, and if by accident, or by failure of the strict Roman Catholic line of Earls, as has actually happened since, the title should devolve on the Protestant line, if that Act had not been altered or affected that Protestant Earl would have been entitled to alienate the estates. It was, therefore, not strictly at that time an annexation of the settled estates in the will, but

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only subject to the contingency of there being no Protestant Earl, or of no Earl becoming Protestant.

These two properties were thrown into certain farms which were described in the schedule to the Act of 43 Geo. 3, c. 40. The object of that Act was to vest part of the settled estates of the Earl of *Shrewsbury* in certain counties in trustees for sale, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments to be settled in lieu thereof to the same uses and subject to the same restrictions. The Act, therefore, by its title, was confined to selling a portion of the settled estates, and buying other estates to be settled to the same uses. When we look at the recitals of that Act, we find it most carefully restricted to the settled estates:—[His Honour then read parts of the recitals.] The object of the Act is thus shewn to be to authorize the sale of certain portions of the settled estates in certain counties, for the benefit of the Earl and those entitled in remainder, and to purchase other estates in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, which would be more conveniently held with the bulk of the Earl's estates in those counties. Then it is enacted that all and singular the manors and lands situate and being in the several counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, limited and settled by the indentures of the 3rd and 4th of March, 1718, and by the Act of 6 Geo. 1, c. 29, which were described in the schedule annexed to the Act now referred to, with all and singular (the common words as to manors) whatsoever to the same "belonging or in anywise appertaining, or therewith used, occupied, possessed, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof," are to be sold.

Now it is not disputed that no lands passed except lands comprised in the settlement and in the Act of Parliament, and particularly described in the schedule. The mere fact of land being described in the schedule and not described in the settlement, or described in the settlement and not comprised in the schedule, would not suffice to vest them. In order to get vesting you must get the parcels in all three instruments—the settlement, the Act of Parliament, and the schedule. And it is admitted that these lands in question are in the schedule, but are not in the settlement, and not in the Act of Parliament. Therefore it must be admitted

that the vesting clause would not apply unless the general words help it. But the general words are only that which is "possessed or enjoyed and accepted as part, parcel, or member thereof," that is, part, parcel, or member of the settled estates. The "thereof" refers to the things vested. I take it the proper meaning of those words is to refer to the things conveyed or vested by the previous words; and there is not a particle of evidence to shew that these were ever held or occupied as part or parcel of the settled estates. The only evidence before me is, that in the years I have mentioned they were purchased in fee simple by the fourteenth Earl of *Shrewsbury*, which, of course, is contrary to that supposition; so that if the matter stood there, I should hold that the general words would not pass these lands. But it does not stand there.

Nothing, I consider, is better settled than that these general words, even where they would pass the land *ex vi terminorum*, are restricted by the recitals and what is called the scope of the instrument. This is illustrated by the case of *Hopkinson* v. *Lusk* (1), before Lord *Romilly*. The principle is, that though words of specific description are not easily dealt with, yet general words are; and that, though general words may be in themselves large enough (which I do not think these are, because there is no evidence to comprise the property in dispute), yet if, upon the whole scope of the instrument, as to which especial regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass those properties, it will not pass them.

In *Hopkinson* v. *Lusk* the words were certainly large enough; here I think they are not large enough, because there is no evidence that the lands were held as part of the settled estates, the mere fact of their being in the same occupation not being sufficient. Therefore I hold that the estates in question are not affected at all by this Act of Parliament; that, therefore, both at law and in equity, they remained the absolute fee simple property of the fourteenth Earl of *Shrewsbury*. The result of that is this, that they passed ultimately to *Bertram*, the seventeenth Earl of *Shrewsbury*, and finally would pass by his will to the third Plaintiff, Lord *Edmund Howard*, being the first tenant for life, and the

(1) 34 Beav. 215. 10 Jur. N.S. 288

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other Plaintiffs, being tenants in remainder under legal devises in the will of *Bertram* Earl of *Shrewsbury*. That disposes of the right of the Plaintiffs both at law and in equity to these two parcels of land.

I now come to consider the second and the fourth parcels. There is a difference between them which is by no means immaterial, and it will be necessary, therefore, to say a word as to the titles of those parcels. No. 2 was a piece of land bought in 1770 by the same *George* fourteenth Earl of *Shrewsbury*, but for some reason, which does not appear, instead of taking the conveyance to himself, he took the conveyance in the name of his solicitor, one *John Ingram*, and under an award made on the 9th of July, 1770, some other lands were awarded, and of course became subject to the same title in lieu of the lands so purchased. Since the award of 1770 nothing further seems to have been done as regards these lands. The heir of *Ingram* is not known, and, as far as I can see, the legal estate is outstanding in the heir of *Ingram*. It was suggested that I was entitled to presume conveyance, but I do not think I can presume a conveyance simply from lapse of time. There is no dealing with the property unless so far as the Act of Parliament I am about to mention may be deemed a dealing. It does not appear to me that my decision in any way depends on the fact whether the legal estate is or is not outstanding in the heir of *Ingram*.

Parcel No. 4 had been bought also by an Earl of *Shrewsbury;* but in the year 1832 an attempt was made to include these lands and other lands of very great value in the *Shrewsbury* settlement, and they were conveyed under circumstances which have been held by the Appeal Court in Chancery to have been such as to deprive that conveyance of any validity in equity, but not, of course, destroying its validity at law. They were in 1832 conveyed to the uses of the *Shrewsbury* settlement, and consequently, at the time of the passing of the Act 6 & 7 Vict. c. 28, those lands were settled to the uses of the *Shrewsbury* settlement, and apparently, though not in reality, equitably settled to the same uses also.

Under these circumstances an Act is obtained which, by its title, is not exactly so restricted as the Act of the 43 Geo. 3, because, in addition to a similar title to that mentioned in the

former Act (in fact, almost in the same words, vesting part of the estates in trustees, and so forth), it contains the words, "and for other purposes therein mentioned." Now when you come to look at the Act, it is quite obvious what the other purposes were. The chief purpose, perhaps, for which the Act was obtained at all was this, that in the year 1843 it was not improbable that what I will call the Roman Catholic line of Earls of *Shrewsbury* might come to an end, and it was the desire of the then Earl of *Shrewsbury* that the estates annexed to the title in the peculiar way that I have mentioned should continue to be annexed to the title, although a future Earl might be Protestant. And one of the purposes, if not the chief purpose, for which this Act was obtained was to get rid of the provision by which a Protestant Earl could alienate the estates, and a clause for this purpose was inserted in the Act, and has proved effectual. The recital of this Act as regards the intention to vest the portions of the estates in trustees for the purpose of selling them, which is the portion of the Act with which I have to deal, is quite as clear and explicit as the recital in the Act of Geo. 3.

It is admitted that parcels No. 2 and No. 4 are comprised by a proper description in the schedule to this Act of Parliament. Now the vesting words are not the same, nor is the same form of vesting adopted that was adopted in the case of the Act of Geo. 3: instead of confining the vesting to the settled estates, whether accidentally, as Lord *Chelmsford* seems to have thought, or whether under some notion of attaching all they could to the title, or how otherwise, I cannot say, the form has been varied, and the enacting clause is this: "that all and singular the manors or lordships, lands, messuages, farms, tenements, and other hereditaments," and so forth, "together with all, &c., particularly mentioned and described in the 2nd schedule to this Act, shall and are hereby and from henceforth vested in and settled upon" the trustees, freed and absolutely discharged from the uses and trusts declared of the said manors, or any of them, nevertheless on trust for sale.

Now, the question I have to decide here is similar, no doubt, to the question I had to decide on the other Act, but the circumstances are different. I am asked now, not to give effect to the plain

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meaning and construction of the Act, but to control plain words. I have not now to deal with general words, but I have to deal with precise and specific descriptions, and I feel myself, in the present state of the authorities which have settled the landmarks of real property law in a way which no Judge is entitled to disturb, in a position to say this, that I am not aware of any authority in which a clear, precise, and specific description of property in the operative part of a deed has been controlled at law by the effect of mere recitals, or by inference from the covenants or subsequent parts of the deed. No case has been produced to me on the part of the Plaintiffs, and considering, as I do, that this private Act of Parliament must be construed in the same way as a deed of conveyance, although I am quite satisfied that, looking at the recitals in the subsequent parts of the Act, which I need not go into in detail, the Legislature must be taken to have considered that it was dealing with settled estates, yet I am not enabled to strike out from that vesting clause the conveyance of all that was contained in the schedule, whether it was settled or not; and I am, therefore, bound to hold, that, so far as there was any legal estate in any of the persons excepted from the saving clause of this Act, that legal estate passed to the trustees of the Act, and it passed to them of course on the trusts thereof, whatever those trusts were.

The remaining question is, what were the trusts? Now of course in all these cases where you vest lands contained in a schedule, and do not restrict them to settled estates, it is wise and prudent to take care that you do not give one man's land to another man. That is not to be presumed to be the intention, and in this case we have actual recitals which shew that it was not the intention, and, therefore, when the Legislature used terms which might have carried the legal estate to these trustees apparently on trust for sale, the Legislature at the same time took care that they should not convey to the trusts of the settlement any land not already subject to those trusts, and they did this by two clauses which are not immaterial.

The 5th clause is in these terms: "That in the meantime, and until such sale or sales as aforesaid, the said manors and other hereditaments hereby vested in trust as aforesaid, or the unsold

part or parts thereof, for the time being shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto, and ought to have held and enjoyed the same, in case the same premises had not by this Act been so vested in trust as aforesaid." I think plainer words, clearer words, could not have been used; they are enacting words, they are not to be controlled by any fancy or caprice of mine; and as these lands have not been sold the result is that the person who would have been entitled to them if the Act had not passed is now entitled in equity: the result, therefore, will be that the persons entitled under the will of Earl *Bertram* are entitled to these lands at present.

But I go a little further. I think the same observation applies to the 3rd clause directing the application of the money. The clause directs that after sale the money shall be applied to the purchase of land, and the land "so to be purchased as aforesaid shall be conveyed, settled, and assured to the uses, and with, under, and subject to the powers, provisoes, conditions, limitations, restrictions from alienation, declarations, and agreements, to, with, under, and subject to which the said manors or lordships, and other hereditaments hereby vested in trust as aforesaid, would have stood limited and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased and other circumstances will admit." That gets rid of any observation on the words "restriction or alienation"; it was not absolute, but as near thereto as circumstances would admit. Now it is said that the word "respectively" is not there, but it is there from its nature. As you may have the land settled to various uses, as I shall shew presently, even as regards the settled estates, and you are to settle the purchased land to the same uses as the land sold, you must have regard to the uses to which the lands sold were subject.

As regards the settled estates, I will take only one instance to shew that the uses might be different. There are rather ample jointuring powers given by this Act of Parliament, under which a jointure may be charged on one portion of the estate, and then a second jointure on another. If one jointress had a right to one

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part of the estate, and another jointress had a right to another part of the estate, and a third part of the settled estate was free from jointure, it would be proper and prudent for the trustees to sell those three parts separately, and settle the purchased estates in the same way. If they did not, still I think, under the general doctrine of equity, a Court of Equity could apportion the purchase-moneys according to the value of the estate sold, because such jointress would have a right to a fair proportion of the property purchased with the moneys arising from the three estates sold together. But the trustees would best perform their duty by selling them separately. Therefore you have here a positive and distinct enactment again, that whoever would have been entitled to the estates, if they had not been vested in the trustees, would be entitled to the estate purchased with the money arising from the sale.

Now, according to the well-settled doctrine of equity, if a man is entitled to an estate until sale, and he is also entitled to have the purchase-money laid out in land to which he is to be absolutely entitled after sale, he has the whole right to the estate, and the bare trustee in whom it is vested has no right to sell it without his consent. He can no more sell it for his own benefit than under a trust for accumulation he can accumulate it for his own benefit. It comes, therefore, in substance to this, that the owner of the estate has a right to say, "It shall not be sold without my consent." Now this consent was expressly reserved to the Earls of *Shrewsbury*. If by reason of alienation it was possible for the estate to pass away to somebody else, of course there would be an end of the trust for sale. If there is a vesting of property by private Act of Parliament in trust to sell with the consent of the owner, under a settlement to hold the purchase-money upon trust to purchase other estates to be more conveniently held with the settled estates, and the property so directed to be sold becomes by alienation the absolute property in fee of somebody else, there is an end of the trust for sale, which does not last for ever, but ceases when the nature of the trust is such that it cannot be properly exercised after the change in the ownership. And therefore I hold that the absolute equitable ownership passed under the will of Earl *Bertram* to his devisees. The result, therefore, is, that, in my

opinion, the whole of the property in dispute belongs to the Plaintiffs as devisees under the will of Earl *Bertram*.

I should have been very glad, for the sake of the law, if I could have stopped here, and have said that, that being my opinion, I should give effect to it, as I intend to do, by the decree I am about to make. But it is quite impossible for me to pass over in silence the objections of a purely technical character which have been adduced to induce me to say that I am not able to do justice in this case. As regards the property comprised in the Act 6 & 7 Vict. c. 28, they have no application in the view which I have taken of the case, because the bill is framed under the notion that the legal estate became vested in the Defendants, the trustees of that Act of Parliament, upon the trusts of that Act, and that is the view I myself have adopted. But as regards the property which was supposed to be comprised in the Act of 43 Geo. 3, c. 40, it is said that, inasmuch as the legal estate did not pass by that Act to the trustees of it, the Plaintiffs are entitled both at law and in equity, which I have already decided to be a true view of the instrument, and that, being entitled both at law and in equity, they are not entitled to sue in a Court of Equity, but must sue in a Court of Law, or, in other words, must bring ejectment, and must not proceed by bill.

It is quite true that, as a general rule, a Plaintiff who has both a legal and an equitable title to land must proceed at law and not in equity. But there are various exceptions to that rule, and one of those exceptions is this, that if the person entitled to possession of the land is an infant, and the Defendants have taken possession of the land to which he is so entitled, he has a right to sue in equity to get both the profits of the land which have been so received by the Defendant, and also the possession of it, delivered up to him. Now, it happens accidentally that the person entitled under the will of *Bertram*, the seventeenth Earl of *Shrewsbury*, the second Plaintiff on this record, is an infant, and his infancy is stated on the face of the bill, and, as I understand it, all the infant has to do is to state that he is an infant, that he is entitled to the land, and that the Defendants have taken the rents and profits or the possession from him, and kept him out of it. And I find all that very satisfactorily stated on this bill, and the facts are

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admitted by the answer. In my judgment the infant is not bound to state any more, and, having asked for an account of the rents and profits to be paid to him and somebody else, and having asked also for a declaration that he is the person entitled under the will, which makes him entitled first, and having prayed for general relief, he is entitled to have those rents and profits paid to him alone.

[His Honour then referred to another technical objection to the Plaintiffs' right to relief arising from the form of the pleading, which he overruled.]

Now, the only point left to consider is, whether the Plaintiff the infant, the first tenant for life, could succeed on such an allegation as that contained in the bill without more, and I was referred on that point by the leading counsel of the Defendant to the decision of Lord *Romilly* in *Crowther* v. *Crowther* (1), where he says: "It is said that this is the case of an infant, and that the principle above stated does not apply to the case of an infant; but I think the authorities cited do not establish any such distinction. This Court will not allow an infant to be turned out of possession of an estate without legal process, and, accordingly, the cases cited are all instances of a person intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same situation as any other person, and must first establish his legal title."

I must say, because I am driven to it, I am clearly of opinion that that is not a correct statement of the law. If Lord *Romilly* had decided this for the first time, and there were no other decision on the subject, I should be bound to follow that decision, and should most unhesitatingly follow it; but in the first place, I am satisfied that the then Master of the Rolls did not intend to establish any new law at all. He was merely stating what appeared to him to be the result of the decisions, and he confined his remarks to the authorities cited before him. Having looked at all those authorities, I find, somewhat to my surprise, that they do not bear out the statement at all. I have also looked at a great many others which are entirely contrary to it. I will, out of respect to

(1) 23 Beav. 305, 308.

my predecessor, advert to one or two of them. I cannot help thinking that Lord *Romilly* had forgotten for a moment the technical meaning of the word "intruding," and that "intruding" was used in the old books, not in the sense of turning anybody out, but of taking the vacant possession immediately after the death of the ancestor, before the heir or devisee entered, and that that misled him a little, I think, as to what the authorities mean. But it is, I think, quite plain, on the authorities stated by him, without going to the others, that no such distinction can be made out.

One of these authorities was the case of *Newburgh* v. *Bickerstaffe* (1), which was a bill depending on a title of some marsh lands, and the judgment is this: "The Lord Keeper observed, that *Littleton* says if a man intrudes upon an infant, he shall receive the profits but as guardian"—that means intrude in the technical sense, not in the sense that the infant was already in possession—"and the infant shall have an account against him in this Court as against a guardian." There the Court retained the bill, and directed a trial in ejectment, so that it did not act on any notion of the word "intrude." Now the very retention of the bill shews that the Court was in favour of the infant's right, that in quoting those words of *Littleton*, the then Lord Keeper understood them in the sense I have mentioned, because he did not dismiss the bill, but he retained the bill, directing an action to be tried to determine the legal right, which I should have been compelled to do here had it not been for the passing of *Sir John Rolt's Act*. The case, therefore, is an authority in favour of the right of the infant, and shews that the word "intrude" must not be used in the modern but in the technical sense.

The next case is the case of *Yallop* v. *Holworthy* (2), which I need not cite. The next is of more importance, *Morgan* v. *Morgan* (3); that is a case before Lord *Hardwicke*, when Lord Chancellor, and he states the law in this way: "Where any person, whether a father or a stranger, enters upon the estate of an infant"—not turns the infant out, but takes the estate—"and continues the possession"

(1) 1 Vern. 295.
(2) Eq. C. Abr. p. 7, pl. 10.
(3) 1 Atk. 489.

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—that is what has happened in this case, because the present Earl has since the death, there being an intervening Earl, entered into possession, with the consent of the trustees, of the rents and profits during the infancy of the Plaintiff, the first tenant for life—"this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined." So that he does not state the law to be that the infant must be turned out of possession, or that the law does not apply, or that it was a case of an infant who had ever been in possession.

The next case cited is *Dormer* v. *Fortescue* (1), before the same Judge. There the Lord Chancellor says this: "So in the case of a bill brought by an infant to have possession of the estate," not merely an account of rents and profits, but "possession of the estate and an account of rents and profits, the Court will decree an account from the time the infant's title accrued, for every person who enters on the estate of an infant enters as a guardian or bailiff for the infant;" thus putting the case not at all as Lord *Romilly* put it, but in the broadest terms, irrespective of whether the infant was in possession or not. The next case is a case of *Blomfield* v. *Eyre* (2). There the infant had never been in possession, and he sought to take away the property from some other person who had purchased the property, and Lord *Langdale* says (3): "Considering the infancy of the Plaintiff, and the notice which the Defendant possessed at the time of his purchase, it appears to me, that if the Plaintiff establishes his title, he will be entitled to consider and to treat the Defendant as having possessed the estate in the character of bailiff, and as being liable to account accordingly." The last case cited was a case of *Hicks* v. *Sallitt* (4), which I do not think has any direct bearing upon this proposition.

I have gone through the cases cited before Lord *Romilly* to shew that they do not bear out the proposition which he thought they did. There are other authorities very distinct, such as *Wyllie* v. *Ellice* (5), and the case of *Boddy* v. *Lefevre* (6), and the numerous

(1) 3 Atk. 124, 130.
(2) 8 Beav. 250.
(3) Ibid. 258.
(4) 3 D. M. & G. 782.
(5) 6 Hare, 505.
(6) 1 Ibid. 602, n.

cases in the notes to that case, but it is not necessary to go into them. The result therefore is, adopting the language of Lord *Hardwicke*, that an infant is entitled to treat a stranger who takes possession of his estate as his "bailiff" or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession. But it is said that such an account is usually decreed with wilful default; that nothing is mentioned here about wilful default, and that the mere fact of its not being mentioned prevents the Court from decreeing an account. Now I do not agree to that. Supposing that the Plaintiff alleges the Defendant to be mortgagee in possession, then prays an account of rents and profits and general relief, can it be said that he cannot take the account for wilful default? He has put in the necessary allegations on which his title to the account depends; and therefore, if it were pressed before me, I should have given an account in that shape. But it was not asked, and there is no occasion for me to consider it; of course it is always desirable not to make men account for more than they have actually received.

That being so, I think the Plaintiffs' title is established; that is, the title of the Plaintiffs according to their order. The first tenant for life takes first, and the others in order. It is immaterial that they have been made co-Plaintiffs. And I think that there must be a declaration accordingly, and an order to take an account against the present Earl of the rents and profits from the time he entered into possession; and that possession of the estate should be given up to the infant's guardian.

Solicitors for the Plaintiffs: Messrs. *Currie & Williams.*
Solicitors for the Defendants: Messrs. *Parkin & Pagden.*

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SAULL *v.* BROWNE.

[1872 S. 237.]

Practice—Affidavit of Documents—Further Affidavit—Reasonable Suspicion.

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The Court will order a further affidavit as to documents to be made by a Defendant, if it is satisfied from the admissions in the Defendant's answer that material documents not mentioned in his affidavit may be in his possession, even although the answer does not in express terms admit the existence of such documents.

Where a Defendant by his answer set out a long list of customers of a business carried on by him, but did not mention in his affidavit as to documents any books relating to such business:—

Held, that the Defendant must make a further affidavit.

Noel v. *Noel* (1) and *Wright* v. *Pitt* (2) considered.

THOMAS SAULL, by his will, dated the 25th of August, 1855, bequeathed certain leasehold property in *Aldersgate*, where he carried on the business of a wine and spirit merchant, and all the trade fixtures, stock-in-trade, and book debts connected with the business, to his wife, *Sarah Saull* (the Plaintiff), his nephew *William Saull*, and *John Prout* (who disclaimed), upon trust during the life of *Sarah Saull* to permit her and his son *William Devonshire Saull* to continue and carry on the said business as they should think fit; and he bequeathed his residuary personal estate upon trusts for the benefit of the Plaintiff during her life, and after her death for the benefit of his children; and he appointed the Plaintiff, *William Saull*, and *John Prout* executors of his will.

The testator died in October, 1855. From that date down to January, 1858, the testator's business was carried on under the powers contained in the will.

In 1858 arrangements were made which resulted in a partnership being entered into between the Plaintiff, the Defendants *William Jarman Browne* and *Charles Godfrey*, and *William Saull*, for the purpose of carrying on the said business. This partnership continued down to the 31st of December, 1871, and the affairs thereof were being wound up under a decree of the Court of

(1) 1 D. J. & S. 468. (2) Law Rep. 3 Ch. 809.

Chancery, dated the 2nd of December, 1872, by which it was in effect declared that the capital employed in the said partnership (except any which had been brought in by *Godfrey* and *Browne*), and the goodwill thereof, formed part of the estate of the testator.

The bill in the present suit was filed by *Sarah Saull* against *Browne*, *Godfrey*, *William Saull*, the persons beneficially interested under the will of *Thomas Saull*, and *Joseph Gardiner Findley*, alleging that *Browne* and *Godfrey*, in or about May, 1872, set up a wine and spirit business in *Worship Street*, and had subsequently entered into partnership with *Findley* as a dormant partner; and that this *Worship Street* business was commenced and was carried on by means of moneys and assets which *Browne* and *Godfrey* had improperly withdrawn from the *Aldersgate* business; and that *Browne* and *Godfrey*, without the knowledge of the Plaintiff, improperly contrived to transfer a large portion of the goodwill attached to the *Aldersgate* business from that business to the *Worship Street* business; and it sought to recover from *Godfrey*, *Browne*, and *Findley*, for the benefit of the testator's estate, the assets and goodwill so alleged to have been improperly withdrawn from it. With the view of establishing this case the Defendants *Browne*, *Godfrey*, and *Findley* were interrogated, amongst other things, as to who the customers of the *Worship Street* business were, and which of them had been customers of the *Aldersgate* business, and by their answers they set out the names of such customers in two very long schedules. They were also called upon to make an affidavit as to documents, and made an affidavit accordingly, but did not include in it any of the books of the *Worship Street* business. A summons was now taken out, calling on them to make a full and sufficient affidavit, stating in particular whether they had in their possession any and what books and documents relating to the *Worship Street* business.

Mr. *Southgate*, Q.C., and Mr. *Locock Webb*, for the summons.

Sir *R. Baggallay*, Q.C., and Mr. *Bradford*, for the Defendants *Browne* and *Godfrey*:—

The answer does not admit the possession of any documents;

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and though it was said in *Noel* v. *Noel* (1) that a Defendant might be ordered to make an affidavit upon "reasonable suspicion," it has since been laid down that such suspicion must arise from some admission throwing discredit on the sufficiency of his affidavit: *Wright* v. *Pitt* (2). Besides, the Court has refused to order production of such documents: *Carver* v. *Pinto Leite* (3).

Mr. *Russell Roberts*, for the Defendant *Findley*, said that his client was merely a dormant partner, and, under the articles of partnership, had no control over the books; and asked that the summons might be refused against him.

SIR G. JESSEL, M.R.:—

I regret that this summons has been resisted. I am convinced that the Defendants have in their possession documents relating to the business in *Worship Street* which ought to be mentioned in the affidavit. I infer this from the statements in the answer, in the schedules to which, they have set out a long list of customers, which could not have been made from memory merely. I am satisfied by inference from these statements that the Defendants have in their possession material documents relating to the questions in this cause. It is said that the Defendants do not admit the possession of such documents; but the decisions do not require the Judge to find an admission in express terms; the Judge may form his conclusions by inference from the statements in the answers before him. I think it does here sufficiently appear from their answers that there are such documents, and that the order may therefore be made. The order will be that a further affidavit be made by the Defendants *Godfrey* and *Browne*, the Defendant *Findley* admitting that all the documents are in their possession. The costs will be costs in the cause.

Solicitors: Messrs. *Miller & Miller*; Messrs. *Rooks, Kenrick, & Co.*; Mr. *W. Crook*.

(1) 1 D. J. & S. 468. (2) Law Rep. 3 Ch. 809.
(3) Law Rep. 7 Ch. 90.

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March 2, 4.

[1873 G. 134.]

Will—Non-exclusive Power of Appointment—Gift of Legacies followed by Gift of Residue—Implied Charge of Legacies.

The doctrine of *Greville* v. *Browne* (1), viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of the residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive; and in such a case the legacies are charged on property subject to a power of appointment.

A testatrix, having power to appoint certain funds by will in favour of *A.*, *B.*, *C.*, *D.*, and *E.*, in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of £5 each to *A.*, *B.*, and *C.*, and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to *D.* and *E.*, and died leaving some personal estate of her own:—

Held, that the will was a valid execution of the power.

THIS was a Special Case.

Under a settlement dated the 31st of August, 1841, the trustees of certain funds were directed, in the events which happened, to hold them on trust for *T. Dunn*, *Mary Dunn*, *Elizabeth Gainsford*, *S. R. Dunn*, and *J. I. Stainton* (the brother and sisters of *Anne Dunn*), or their respective issue, in such parts, shares, or proportions as *Anne Dunn* should by will appoint.

Anne Dunn made her will, dated the 20th of November, 1869, which (omitting formal parts) was as follows:—"I appoint my sisters, *Mary Dunn* and *Sarah Rebecca Dunn*, executors. I give and bequeath to my brother *Thomas Dunn*, and to my sister *Elizabeth*, the wife of *Robert John Gainsford*, Esquire, and *Jane Isabel Stainton*, the wife of *Henry Tibbats Stainton*, Esquire, the sum of £5 each. All the rest and residue of my property, of whatever kind and wheresoever situate, and over which I have any power of appointment or disposition, I give, devise, and bequeath unto and to the use of my sisters *Mary Dunn* and *Sarah Rebecca Dunn*, their

(1) 7 H. L. C. 689.

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heirs, executors, administrators, and assigns respectively, for their own absolute use and benefit as tenants in common."

It was stated that *Anne Dunn* left some property of her own; the exact amount was not given. She was not at her death entitled to exercise any power of appointment other than that stated above.

The first question in the case was, whether the will of *Anne Dunn* was a valid exercise of the power of appointment. It is unnecessary to state the other questions.

Mr. *Southgate*, Q.C., and Mr. *Owen*, for the Plaintiffs:—

The power is non-exclusive. *Anne Dunn* has appointed nothing to her brother *T. Dunn*, or her sisters *Elizabeth* and *Jane Isabel*. The will is therefore not a good exercise of the power.

[The MASTER OF THE ROLLS referred to *Greville* v. *Browne* (1).]

The doctrine of that case has never been applied to wills made in exercise of special powers.

[They referred to *In re Teape's Trusts* (2).]

Mr. *Kenyon S. Parker*, for Defendants in the same interest.

Mr. *Roxburgh*, Q.C., and Mr. *Ince*, for other Defendants, were not called on as to this question.

Mr. *Morshead*, for the trustees.

SIR G. JESSEL, M.R.:—

There never was a better illustration of the extreme technicality of our law than the case I have before me. One must really state what the law is in order to understand the point raised. Under the old law, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. The power was called a non-exclusive power, and it was considered that the author of the settlement intended everybody to take a substantial share. That was not according to the

(1) 7 H. L. C. 689. (2) Law Rep. 16 Eq. 442.

literal wording of the power, but it made sense of it: because if the appointment of a farthing would do, then, on the principle "*de minimis non curat lex*," it would make every non-exclusive power an exclusive power. However that doctrine was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say, without resorting to litigation, what the least sum was which the appointor was authorized to appoint. That inconvenience led to an alteration of the law, and the Legislature, under the guidance of a very great lawyer, made this very remarkable alteration: it directed that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but it did not alter the construction of the power. The consequence of this remarkable alteration of the law has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling, or even a farthing, to every object of the power, the appointment is bad, because some one is left out. One would have imagined that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get. However that is not the state of the law, and in this present instance an appointment by a lady, who had a power of appointment between her brother and her sisters, is objected to, because it is said she has forgotten to appoint a shilling to the brother and two of her sisters, she intending that the remaining two sisters should take the whole of the property. I have now to decide whether this appointment is bad on that ground. That question depends on the construction of the lady's will, and that, again, depends on the rules of construction which have been adopted, certainly not with a view to the exercise of powers of appointment, but with respect to a very different subject-matter.

There can be no doubt that this is a non-exclusive power. The power is:—[His Honour stated it:—] Therefore *Anne Dunn* could only appoint among those persons named in the settlement, and she could only appoint in such shares and in such manner. She had no power to exclude any one. She was a spinster. It was stated that she had some personal estate, and that it was small, but my judgment does not turn on the amount of it, which is not stated

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in the special case. She has made her will as follows:—[His Honour read it.]

Now it was conceded in argument that if the lady had given a shilling out of the appointed fund to the brother *Thomas* and to the sister *Elizabeth* and the sister *Jane*, then, under the words I have mentioned, the two other sisters, *Mary* and *Sarah Rebecca*, would have taken the fund over which she had a power of appointment, absolutely. But it was said that the appointment would fail altogether, because she had given nothing out of the appointed fund to the brother and to the two sisters. That, as I said before, is a question of construction of the will. It was opened as if it was incapable of argument; but I think it not only capable of argument, but, upon consideration, I have not even called on the other side. The question is, whether any part of the sums of £5 each given to the brother and the two sisters is or is not payable out of the fund subject to the power of appointment. The gift is, no doubt, of £5 only, and if there had been nothing else afterwards, would have been a common legacy out of her personal estate. Then she gives the rest and residue of her property, of whatsoever kind, and wheresoever situate, and over which she has any power of appointment or disposition, to the use of her sisters *Mary Dunn* and *Sarah Rebecca Dunn*, their heirs, executors, administrators, and assigns, for their own absolute use and benefit. So she has given the residue, first of her property, and next of property over which she has a power of appointment; she has given them together. Now this kind of gift has been the subject of frequent judicial decision. I may refer to the case of *Bench* v. *Biles* (1), to the case of *Greville* v. *Browne* (2), and the later cases of *Francis* v. *Clemow* (3) and *Gyett* v. *Williams* (4) before Vice-Chancellor *Wood*. Those cases were cases of a gift of residue of real and personal estate; but the result of the cases is this: that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund. The

7 Ch D 323
12 Ch D 165

(1) 4 Madd. 187.
(2) 7 H. L. C. 689.
(3) Kay, 435. 18 Jur 223.
(4) 2 J. & H. 429.

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question has generally arisen when the personal estate has failed, when it is said the legacy is payable out of the real estate. But in truth it is payable out of both funds, by force of the word residue, and therefore to some extent depends on the relative value of the funds. That being so, and applying that doctrine, the sums of £5 each are payable partly out of the testatrix's own property, and partly out of the fund appointed. The rule is, that there must be at least a farthing payable out of the fund subject to the power, and, as I said before, however small the sum appointed may be, the appointment cannot be objected to as being illusory. This is an appointment out of the fund of some portion of the £5 to the brother and each of the two sisters. The consequence is, I hold the power well executed, and each of the ladies will take, subject to the small legacy, the whole of the appointed fund, and thus I can give effect to this lady's will. In fact, it is an instance, of which we have so many, of a technicality defeating a technicality, and the true intention of the testator taking effect.

Solicitors: Messrs. *Dobinson & Geare;* Messrs. *Tanqueray-Willaume & Hanbury.*

In re ELLIS' TRUSTS.

M. R.
1874
March 21.

Married Woman—Bequest of Consols absolutely—Restraint on Anticipation.

Where a fund producing income is given absolutely to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture.

A testatrix, by her will, gave to a married woman a sum of consols; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into Court under the *Trustee Relief Act*, and the married woman presented a petition for a transfer of the fund to herself:—

Held, that she could only have the income paid to her during her coverture.

As to the effect of a clause restraining anticipation on an absolute gift of a fund not producing income, *quære.*

ELIZABETH ELLIS, by her will, dated the 21st of May, 1860, gave to *Augusta Maria Allen* (a married woman) the sum of £500

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£3 per Cent. Consolidated Annuities; and she also thereby gave to married women various life interests, and also sums of stock and money, which were to be paid and transferred to the legatees after the determination of life interests thereby bequeathed to other married women. One such legacy was of £20 only. By a codicil dated the 18th of March, 1871, the testatrix directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation.

The testatrix died on the 15th of September, 1873, and her executor transferred into Court a sum of consols to answer the above-mentioned legacy to *Augusta Maria Allen.*

Augusta Maria Allen now presented a petition, asking for a transfer of the fund to herself.

Mr. *North,* for the Petition:—

I submit, in the first place, that the codicil does not apply at all to such a gift as this. The gift is of a sum of stock, to take effect immediately on the testator's death, and, from its nature, does not admit of being anticipated. The codicil restrains "anticipation," and can only apply to gifts which are capable of being anticipated, of which there are plenty in the will. The testatrix could never have intended so small a legacy as one of £20 to be invested, and the income only paid to the legatee. But if the codicil does apply, still the Petitioner is entitled to payment. All that the codicil restrains is alienation by way of anticipation; it does not restrain alienation generally, and therefore there is nothing to prevent payment to the Petitioner. In *Re Sykes' Trusts* (1), where a married woman was restrained from anticipating a fund, it was held that a charge created by her before the fund became payable was ineffectual, but after the fund had become payable, the Court ordered it to be paid to her.

[The Master of the Rolls:—In that case married women were restrained from making "any sale, mortgage, charge, or incumbrance of or upon their respective parts or shares of the said trust fund, or of the annual income thereof." Surely that was a restraint from alienation generally.]

(1) 2 J. & H. 415.

Throughout the argument and judgment the restraint is treated as being against anticipation, and the case is therefore an authority to shew that where the restraint is against anticipation only, the fund may be paid out of Court.

[The MASTER OF THE ROLLS referred to *Baggett* v. *Meux* (1).]

That was a case of real estate, as to which different considerations may apply. In *Re Sarel* (2) and *Re Gaskell's Trusts* (3), Vice-Chancellor *Wood* held that where there was a restraint on alienation, as distinguished from anticipation, the *corpus* of a fund could not be paid out of Court.

[The MASTER OF THE ROLLS:—The words which are the subject of the decision in *Re Gaskell's Trusts* are undistinguishable from those which were used by the testator in *Re Sykes' Trusts* (4); and if there is no mistake about the latter case (which I am inclined to think there is), I must follow *Re Gaskell's Trusts*. It is a later decision of the same Judge, and I observe that *Re Sykes' Trusts* was cited.]

It is submitted that all the cases can be reconciled if the distinction between alienation and anticipation is attended to.

The MASTER OF THE ROLLS:—I am not at all certain that that distinction was brought before the mind of the Vice-Chancellor in *Re Sykes' Trusts*.

His Honour referred to *Spring* v. *Pride* (5) and *Armitage* v. *Coates* (6).

Mr. *Henderson*, for the executor.

SIR G. JESSEL, M.R.:—

I cannot accede to the ingenious arguments of Mr. *North*, but it is very surprising to find that there is no distinct authority on the question I have to decide.

The testatrix, by her will, gives to *Augusta Maria Allen* (who is a married woman) a sum of bank annuities. The subject-matter

(1) 1 Coll. 138; 1 Ph. 627.
(2) 4 N. R. 321; 10 Jur. (N.S.) 876.
(3) 11 Jur. (N.S.) 780.
(4) 2 J. & H. 415.
(5) 10 Jur. (N.S.) 646.
(6) 35 Beav. 1.

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of the gift is, therefore, not a sum of money, and I do not now decide anything as to such a gift. What the testatrix has done is to give a perpetual annuity to a married woman absolutely; it is not, strictly speaking, a gift of a capital sum, but of a perpetual annuity, subject to redemption by the State.

Having done that, the testatrix, by her codicil, directs that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female shall be for her separate use and (whilst she shall be under coverture) without any power of anticipation.

The first question is, whether these terms apply to this gift of bank annuities? I cannot accede to the argument that they do not. The language of the codicil appears to me to be plain and distinct. The direction extends to all gifts, whether absolute or limited; and it appears to me to apply, and to have been intended by the testatrix to apply, to this gift.

The next question is, assuming that the direction does apply, what is its effect on the gift? It is said that a gift to a married woman of bank annuities, followed by a restraint on anticipation, enables her to take the whole fund at once. It seems to me that a restraint on anticipation as applied to an annuity, prevents the annuitant from getting all the future payments of the annuity at once; if she took them all at once, it would be as plain an anticipation as one could have. That is rather a narrow ground to take. Still I think that, considering the nature of the gift and the language of the will, there is sufficient to enable me to decide the question on this ground alone.

But I also think that after the two decisions in *Baggett* v. *Meux* (1), it must be considered as settled that where there is an absolute gift to a married woman of a fund producing income, followed by a restraint on anticipation, the restraint on anticipation prevents her from alienating the fund during coverture; and I prefer to decide the case on that broader ground.

It is admitted that the position of a married woman as to property which she is restrained from alienating is anomalous. It is apparently assumed by Vice-Chancellor *Knight Bruce* in *Baggett*

(1) 1 Coll. 138; 1 Ph. 627.

v. *Meux* that a married woman may be restrained during coverture from alienating a fund producing income. He says this (1): "It being clear, and admitted on all hands, that, with respect to a life interest given to a married woman for her separate use, she may be effectually restrained from doing, during her coverture, any act of alienation total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act),—it being clear, as I apprehend, that a clause prohibiting alienation or anticipation by a married woman of her separate estate, (when there is no such provision of forfeiture or limitation over), however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it, as to a life interest, at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture, (that is, the law of its own force, preventing the restriction from operation or effect as to any act done when coverture does not exist)—I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference?"

It is true that the actual decision in that case applied to real estate, but the passage I have read appears to me a clear expression of opinion by Vice-Chancellor *Knight Bruce* that, so far as restraint on anticipation is concerned, there is no distinction between capital and income.

Then, on appeal, the Lord Chancellor says (2): "After the case of *Tullett* v. *Armstrong* (3), there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate

(1) 1 Coll. 149, 150. (2) 1 Ph. 628.
(3) 4 My. & Cr. 377.

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to real property as much as to personal." That shews that the Lord Chancellor thought there was no distinction between real and personal estate, between *corpus* and income.

Though I find no direct decision on the point, I think there is sufficient authority to enable me to say that there is no distinction between personal estate producing income and real estate producing rent. I repeat that I decide nothing as to the effect of a clause restraining anticipation where no income is produced. Here I think the Petitioner can only have the income paid to her during coverture.

Solicitors: Messrs. *Norris, Allens, & Carter;* Messrs. *Tanqueray-Willaume & Hanbury.*

THOMSON *v.* FLINN.

V.-C. M.
1874
Jan. 26.

County Court Appeal—Jurisdiction of County Court—Limit of Value—Commencement of Proceedings—Transfer to the Court of Chancery—County Courts Act, 1865 (28 & 29 *Vict. c.* 99) *s.* 9; *County Courts Act Amendment Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 14.

The 14th section of the *County Courts Act*, 1867, does not repeal the 9th section of the *County Courts Act*, 1865. The two sections must be construed together, and where it appears from the plaint itself that the County Court has no jurisdiction the suit ought to be dismissed under the 14th section of the Act of 1867; but where the want of jurisdiction appears only from evidence produced after the institution of the suit, the proper course is to order the proceedings to be transferred to the Court of Chancery under the 9th section of the Act of 1865.

THIS was an appeal from the decision of the Judge of the County Court at *Lambeth*.

The plaint was instituted for the partition of a house, No. 22, *Camberwell Park*, and contained an allegation that the value of the property in question in the suit was less than £500.

No answer was filed by the Defendant under Order II., Rule 3, of the County Court Orders in Equity; but when the cause came on for hearing, on the 14th of October, 1873, he took a preliminary objection that the value of the property was more than £500. He brought forward evidence in support of his objection which the Judge considered sufficient proof of excess of value, and as the Plaintiff did not ask for time to procure evidence in opposition, or apply to have the suit transferred to the Court of Chancery under sect. 9 of the *County Courts Act*, 1865 (1), the Judge found as a

(1) Sect. 9 of the *County Courts Act*, 1865, is as follows:—

"If during the progress of any suit or matter it shall be made to appear to the Court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellors' Courts as the Lord Chancellor may by General Order direct; and such Vice-Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred: Provided always, that it shall be lawful for any party to apply to such Vice-Chancellor at

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fact that the property to which the suit related was of greater value than £500, and ordered the cause to be struck out for want of jurisdiction, and the Plaintiff to pay the costs.

The Plaintiff thereupon appealed.

Mr. *Cotton*, Q.C., and Mr. *T. L. Wilkinson*, for the Appellant:—

This is the same question as arose in *Birks* v. *Silverwood* (1). It is suggested that sect. 14 of the *County Courts Act*, 1867 (30 & 31 Vict. c. 142) (2), was not referred to in that case, and that if it had been mentioned, the decision would have been the other way. But in fact that section did not repeal the 9th section of the *County Courts Act*, 1865 (28 & 29 Vict. c. 99), under which *Birks* v. *Silverwood* was decided. The two sections may be reconciled by treating the latter as applying only to common law suits in the County Court. Where the second Act repeals any part of the previous Acts, it repeals it expressly.

Mr. *Glasse*, Q.C., and Mr. *Cozens-Hardy*, for the Respondent:—

Sect. 14 of the *County Courts Act*, 1867, is entirely inconsistent with sect. 9 of the *County Courts Act*, 1865. The two cannot stand together, and the latter must be considered to have repealed the former; and it is clear that if it had been cited in *Birks* v. *Silverwood*, the decision would have been the other way. It cannot have been intended that parties should be entitled to commence suits in a County Court merely by inserting an untrue allegation that the property in question is within the County Court limit of value.

Chambers for an order authorizing and directing the suit or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the County Courts; and the Vice-Chancellor, if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order."

(1) Law Rep. 14 Eq. 101.

(2) Sect. 14 of the *County Courts Act*, 1867, is as follows:—

"Whenever an action or suit is brought in a County Court which the Court has no jurisdiction to try, the Judge shall order the cause to be struck out, and shall, unless the parties consent to the Court having jurisdiction to try the same, have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction in the matter of such plaint, and the Plaintiff had not appeared, or had appeared and failed to prove his demand."

SIR R. MALINS, V.C.:—

This is an appeal from the County Court of *Lambeth*. The suit was one for the partition of a small property, which in the plaint was stated to be of not greater value than £500, and I have heard nothing to shew that this statement was not *bonâ fide*. At the hearing an objection was raised that the property was worth more than £500, and evidence was tendered in support of that view. The County Court Judge came to the conclusion that the property was worth more than £500. I am clearly of opinion that the proper course for the Plaintiff to have then taken was to apply to have the cause transferred to this Court. But that was not done.

It is said that this case is like *Birks* v. *Silverwood* (1), where a plaint was filed in a County Court, and it appeared on the hearing that the value of the property involved was more than £500, and it was held by the Judge of the County Court that he had no jurisdiction to entertain or proceed to hear or determine the plaint, and the matter came before me on an appeal to discharge the order. In my judgment I said (2): "I admit that if, on the face of the proceedings, the value of the property had appeared to be in excess of the sum which gives the County Court jurisdiction, then the Judge ought to have dismissed the plaint." Therefore, apart from any question as to the 14th section of the Act of 1867, it appears that I decided that case on the ground that the excessive value appeared only during the progress of the suit.

It is contended that, inasmuch as that section was not cited in the argument in *Birks* v. *Silverwood*, I should have come to a different conclusion if it had been cited; and if, in consequence of its not having been cited, the conclusion I came to was wrong, I should not hesitate to say so. But these Acts are to be read together as one Act, and sect. 9 of the Act of 1865 provides that where the want of jurisdiction appears during the progress of the litigation the proceedings are to be transferred to this Court, and sect. 14 of the Act of 1867, that where an action or suit is brought which the County Court has no jurisdiction to try, the Judge shall order the cause to be struck out. Now, there are some actions, such as actions of tort, which the County Court is incompetent to try; and if such an action were commenced in a County Court, the

(1) Law Rep. 14 Eq. 101. (2) Law Rep. 14 Eq. 105.

V.-C. M. 1874 THOMSON v. FLINN.

14th section of the Act of 1867 would at once apply. So if, on the face of a plaint in Equity, it appears that the value of the property is above the County Court limit, that section will at once apply. But if I were to say that in every case where a person has instituted a suit, and it afterwards appears that the amount is ever so little above the County Court limit, the plaint must be dismissed instead of having it transferred into this Court, parties would be in the position of being liable to pay the costs in the County Court when the want of jurisdiction was only discovered in a late stage of the proceedings; and if they instituted their suit in this Court in the first instance, they would be liable, in case the County Court limit was not reached, to pay the extra costs of the parties here.

I am of opinion that I must construe the two clauses together, and take the meaning to be that the order made in *Birks* v. *Silverwood* (1) applies where the fact of want of jurisdiction does not appear upon the plaint, and that the proper interpretation of the 14th section of the Act of 1867 is, that it applies only to cases where the defect appears in the commencement of the proceedings. If I were satisfied that the Plaintiff knew, before the commencement of the suit, that the value of the property was above the County Court limit of value, I should consider that the mere allegation that it was within the amount which gave the County Court jurisdiction would not prevent the dismissal of the plaint. But here the excess of value appeared only on evidence produced at the hearing, which might have turned out to shew that the County Court had jurisdiction. I consider that by adopting this view I am not repealing the Act of 1867, but giving it a rational construction.

I am, therefore, of opinion that the County Court Judge ought to have transferred the suit to this Court; and I am satisfied that he would have done so if *Birks* v. *Silverwood* had been cited before him.

The appeal must, therefore, be allowed, but without costs. The Appellant cannot be made to pay any costs, but I cannot give him any, because it ought to have been suggested to the County Court Judge that the proper course was to transfer the suit to this Court.

Solicitors: Messrs. *Hepburn & Son;* Mr. *Gillespie.*

(1) Law Rep. 14 Eq. 101.

WILSON *v.* O'LEARY.

V.-C. B.
1874
Jan. 24.

[1870 W. 143.]

Administration—Legacy Duty—Costs—Residue.

Testator gave certain legacies free of legacy duty, simpliciter, and other legacies free of legacy duty, with a direction that the duty should be paid out of his residuary estate. The *corpus* of the legacies and the duty having been paid, it was ascertained that the estate was deficient, so that there was no residue available for payment of the duty directed to be thereby borne :—

Held, that the gift of duty out of the residuary estate failed *pro tanto*, and that the legatees whose legacy duty was to be borne by the residuary estate must themselves bear the legacy duty to the extent to which the general personal estate was insufficient to pay the same.

GENERAL SIR *DE LACY EVANS*, the testator, by his will, dated the 6th of September, 1860, and certain codicils thereto, gave a large number of legacies, some of which were given free of legacy duty. Besides these legacies, testator gave to Defendant, *P. A. Hughes*, such an amount as would, with the value of the other bequests thereinbefore made to him, make up "the sum of £20,000 sterling, free of legacy duty," which the testator directed should be borne and paid out of his residuary estate. He also gave £1000 to Mrs. *Passy* and £500 to each of her four sons, and £500 to *C. R. Williams*, which said six legacies the testator desired should be paid free of legacy duty, which he directed should be borne out of his residuary estate.

Upon the hearing in June, 1873, upon subsequent further consideration, it being uncertain whether the estate would or would not be deficient for payment of all the legacies in full, with interest, the Vice-Chancellor directed payment of the *corpus* of the legacies, taxation and payment of costs, and adjourned the further hearing.

These payments having been made, it was ascertained that the estate was deficient to the extent of a part of the interest on the legacies, and the cause now came on for the adjourned hearing. The question was, whether the Defendant *Hughes* and the other legatees whose legacies were given with a direction that the duty was to be paid out of the testator's residuary estate,

V.-C. B. 1874 WILSON v. O'LEARY.

were to bear the duty upon their own legacies to the extent to which the estate was deficient for payment of duty, or whether the legacies not exempted from duty were to abate, so as thereby to provide the means of paying the legacy duty on the legacies to *Hughes* and the other persons whose legacies were similarly given.

Mr. *W. Renshaw*, for the Plaintiffs.

Mr. *Eddis*, Q.C., for *Hughes* and the other legatees of the same class.

Mr. *Phear* (Mr. *Kay*, Q.C., with him), for the residuary and some of the ordinary legatees.

Mr. *B. B. Rogers*, for an annuitant.

SIR JAMES BACON, V.C., held, that there being in fact no residue, the gift of the legacies free of legacy duty to be paid out of the residuary estate failed *pro tanto*, and that the Defendant *Hughes*, and the other persons whose legacies were similarly given, must bear the legacy duty thereon to the extent to which the estate was insufficient to provide for it.

By the Minutes it was declared that the legacy to the Defendant, *P. A. Hughes*, of £20,000, and the legacies of £1000 to Mrs. *Passy*, and £500 to each of her four sons, and of £500 to *C. R. Williams*, all which legacies were mentioned in the first schedule to the Chief Clerk's certificate, and were given free of legacy duty which the testator directed to be borne and paid out of his residuary estate, ought themselves to bear the legacy duty payable in respect thereof respectively to the extent to which the testator's general personal estate was insufficient to pay the same. And it appearing that the legacy duty payable in respect of the capital of such legacies had been paid,

Declare that the same ought to be deducted out of the interest on the same legacies now remaining unpaid; and that if such interest respectively shall be insufficient to make good the respective amounts of such legacy duty, the said several legatees ought to refund the amount of such deficiency respectively out of the capital of their legacies already paid to them. Any of the parties respectively concerned to be at liberty to apply at Chambers with respect to such refunding.

Solicitors: Messrs. *Stephens & Langdale*; Messrs. *Williams & James*; Mr. *Needham*.

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V.-C. B. 1874 Jan. 29.

[1872 P. 82.]

Mortgage—Administration—Creditors' Suit by Mortgagees—Deficient Estate—Costs—Priority.

In a suit by a legal mortgagee for a sale and general administration of the deceased mortgagor's estate, the Court refused to vary the minutes by directing, in case of deficiency of assets, the costs of suit of the executors and devisees of the mortgagor to be paid in priority to the mortgagee's costs of sale.

THIS was a creditors' suit by legal mortgagees of a testator for a sale of the mortgaged property and general administration of the testator's real and personal estate.

On the 10th of December, 1873, a decree was taken establishing the will, directing an account of what was due to the Plaintiffs for principal, interest, and costs of suit, including the costs of the account and consequent on the sale thereinafter directed; account of rents and profits of the mortgaged premises received by the Plaintiffs, or which, without wilful default, might have been received, deducting what would appear to be due on such account of rents and profits from what appeared to be due to the Plaintiffs for principal, interest, and costs. Lands comprised in the Plaintiffs' mortgage to be sold with the approbation of the Judge, and the money to arise by such sale to be paid into Court; "and that thereout, on an application in Chambers, what should be certified to be due to Plaintiffs be paid to them; but in case the money to arise by the said sale shall be insufficient to discharge the said amount to be so certified to be due to the Plaintiffs, then the whole thereof is, on an application to be made in Chambers, to be paid to them." In case such moneys should be insufficient to pay the amount due to the Plaintiffs, they were declared entitled to come in with the other special creditors of the testator, and to receive satisfaction for such deficiency out of the testator's assets in a due course of administration, with the usual accounts and inquiries for that purpose; further consideration and costs being adjourned.

The whole estate was supposed to be insufficient for payment of

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the mortgage debt and the costs of suit. The minutes having been drawn by the Registrar in the form above stated, so as to provide for payment of the Plaintiffs' debt, interest, and costs of suit, "on an application in Chambers," out of the proceeds of sale of the mortgaged property in the first instance, the Defendant, one of the devisees, now moved to vary the minutes as drawn up by providing for taxation of the costs of the Defendants (the executors and devisees), and by substituting the following words: "That in case the money so paid into Court shall be sufficient to satisfy the said taxed costs of the Defendants, together with the amount which shall be certified to be due to the Plaintiffs, such amount be thereout, on application in Chambers, paid to them, and the costs so taxed to the respective parties or their solicitors; but in case the money to arise by the said sale shall be insufficient to satisfy the said costs, together with the said amount, then that the said costs be in the first instance paid thereout to the respective parties or their solicitors, and the residue, on an application to be made in Chambers, be paid to the Plaintiffs."

Mr. *Staffurth*, in support of the motion, cited *Armstrong* v. *Storer* (1) and *In re Spensley's Estate* (2) as authorities that where a legal mortgagee files a bill for a sale (and not foreclosure) and general administration of the deceased mortgagor's estate, he seeks a remedy which does not properly belong to his contract, and the costs will follow the usual rule in administration suits; and if the assets are deficient, the costs of the suit (including the costs of the mortgagor's personal representatives) will be paid in priority to the Plaintiffs' costs of sale.

The VICE-CHANCELLOR said that no such rule existed. The true rule was laid down in *Mason* v. *Bogg* (3). A mortgagee was entitled to the whole of his security, if necessary to satisfy his debt, interest, and costs.

Mr. *T. A. Roberts*, for the Plaintiffs:—

In *Cook* v. *Hart* (4) your Honour stated that "The costs of a

(1) 14 Beav. 535, 538.
(2) Law Rep. 15 Eq. 16.
(3) 2 My. & Cr. 443.
(4) Law Rep. 12 Eq. 459, 463.

mortgagee are the costs of realizing his security. He takes the costs of realizing his security, because he holds the property as a security for his debt. Upon what principle the heir-at-law or devisee can interfere with that right I am at a loss to understand. The property is the property of the pledgee; and the Court can take nothing from the estate until the mortgagee's claim is satisfied."

Mr. *Staffurth*, in reply:—

Cook v. *Hart* (1) was a foreclosure suit, and does not apply to this case, in which the bill is for a sale and general administration.

The VICE-CHANCELLOR declined to vary the minutes, and refused the motion with costs.

Solicitors: Messrs. *Smith, Fawdon, & Low;* Mr. *H. G. Field*, agent for Messrs. *Underhill, Wolverhampton.*

In re HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY.

Winding-up—Practice—Creditor's Petition—Right of Petitioner to dismiss—Costs.

A creditor who has presented a petition for winding up, being *dominus litis*, is entitled, on receiving payment of his debt, to dismiss his petition at the hearing; but creditors who have appeared in consequence of the advertisement of the petition are entitled to their costs.

1 Ch D 619
6 Ch D. 350

THIS was a creditor's Petition for an order to wind up the *Hereford and South Wales Waggon and Engineering Company.*

Since the presentation of the Petition the debt of the petitioning creditor had been satisfied. Notice of this payment, and that it was intended to have the Petition dismissed, had been given to the creditors.

Mr. *Speed*, on behalf of the Petitioner, asked to have the Petition dismissed. He cited *In re Home Assurance Association* (2).

(1) Law Rep. 12 Eq. 459. (2) Law Rep. 12 Eq. 59.

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Mr. *Crossley*, for other creditors, who appeared in consequence of the presentation and advertisement of the Petition, asked that a winding-up order might still be made. He contended that after a Petition had been advertised the Petitioner had no power to withdraw it, but was bound to let it come to a hearing for the benefit of the shareholders and creditors, interested in supporting or opposing it, who had been invited by the advertisements to come in: *In re Marlborough Club Company* (1); *In re Mid-Wales Hotel Company* (2). In any case, he was entitled to his costs: *In re Home Assurance Association* (3).

Mr. *Romer*, for the company, submitted that the opposing creditors, who had received notice that the debt of the petitioning creditor had been paid and that the Petition would be dismissed, were not entitled to their costs of appearance.

As to the right of the Petitioner to withdraw his Petition on payment of his debt, he cited *In re Times Life Assurance Company* (4).

SIR JAMES BACON, V.C., held, in accordance with *In re Home Assurance Association*, that the Petitioner was *dominus litis*, and therefore entitled to have his Petition dismissed. The opposing creditors, having notice of the presentation of the Petition, were entitled to appear, and would have their costs. The Petition would be dismissed with costs, including the costs of the opposing creditors.

Solicitors: Messrs. *Wild, Barber, & Browne*; Mr. *S. H. Head*; Messrs. *C. C. Ellis & Co.*

(1) Law Rep. 1 Eq. 216. (3) Law Rep. 12 Eq. 59.
(2) 17 L. T. (N.S.) 597. (4) Ibid. 9 Eq. 382.

WOODFORD *v.* BROOKING.

V.-C. B.
1874
Feb. 10.

[1872 W. 109.]

Mortgage—Foreclosure Suit—Sale—Absent Mortgagor.

After a decree for foreclosure, but before it was drawn up, a sale was directed on the application of one of the Defendants, a *puisne* mortgagee, with the consent of the prior mortgagees, in the absence of the mortgagor, against whom the bill had been taken *pro confesso*.

MR. *KAY*, Q.C. (Mr. *Grosvenor Woods* with him), applied on behalf of certain of the Defendants, who were third mortgagees, that, instead of the foreclosure directed by the decree made in this suit, an order might be made for sale.

The application was made with the consent of the Plaintiffs, who were second mortgagees, and the first mortgagees (Defendants), and the only difficulty that arose was, that the mortgagor, against whom the decree had been taken *pro confesso*, was absent out of the jurisdiction, and therefore had not consented to a sale in place of a foreclosure.

THE VICE-CHANCELLOR, as the order for a foreclosure had not yet been drawn up, allowed the order to be drawn up for sale instead of foreclosure.

Solicitors: Messrs. *West & King*.

Order as drawn up was expressed to be subject to rules of C. O. XXII. which requires decree to be made absolute but as writ entered a delay of 3 yrs. order was varied by directing an immediate sale. dispensing with service on the defdt the mortgagor &c.

V.-C. B.
1874
Feb. 19.

ASKEW *v.* ROOTH.

[1872 A. 99.]

Will—Construction—Savings of Separate Estate—"Purchased"—Money at Bank.

Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":—

Held, that savings out of separate estate standing to her account at her bankers did not pass.

ADJOURNED summons on behalf of Defendant *J. J. Rowley*, claiming, as general administrator of his deceased wife, a sum of £1944 17*s.* 4*d.* consols, representing a sum of £1787 8*s.* 9*d.*, cash paid by, or by direction of, the deceased wife to her account at the *Sheffield and Rotherham Bank.*

On the marriage of the testatrix, Mrs. *Rowley*, in 1844, to the Defendant, her second husband, settlements were executed under which certain property given to the testatrix for her separate use by the will of her first husband was settled upon trusts as to the income for Mrs. *Rowley* for her separate use without power of anticipation; and after her death, in case her husband, *J. J. Rowley*, should be living, and should not be an outlaw or uncertificated bankrupt, and should not have previously become an insolvent debtor within any Insolvent Debtors Act, and should not have done any act or thing whereby the interest, &c., should have been in anywise assigned, charged, or incumbered, upon trust to pay the interest to *J. J. Rowley* during his life, until outlawry, bankruptcy, insolvency, or assignment, and, subject to certain trusts for children which had not taken effect, upon trust to pay the interest, dividends, and yearly income unto Defendant *J. J. Rowley*, or his assigns, or to permit him or them to receive the same for and during the term of his natural life absolutely, and from and after his decease, then as to as well the capital of the said trust premises as the interest, dividends, and annual income thereof, in trust for such persons as the said testatrix should by deed or will (notwithstanding coverture by any future husband) appoint; and in default of appointment, in trust as therein mentioned.

There were no children of the marriage, and in November, 1852, Mr. and Mrs. *Rowley* separated, but no separation deed was ever executed.

By her will, dated the 28th of March, 1870, in exercise of the power of appointment given to her by the settlements of June, 1845, Mrs. *Rowley* directed that all moneys, shares, stocks, and securities, and all other (if any) trust funds and premises subject to her power of appointment, should, on the determination of the trusts prior to the power, be transferred to Defendants *S. Rooth* and *William Askew*, her executors, and trustees. After directing payment of her just debts, funeral and testamentary expenses, and giving legacies to her executors, and giving two sums of £3000 upon trusts for members of her family, testatrix appointed and declared that her trustees should stand and be possessed of, and interested in, all the residue and remainder of the said trust funds and property upon trust to pay the annual income thereof to the sons living at her death of her brothers *Michael* and *William Askew*, in equal shares, with trusts as to the capital for the issue of such nephews; and she also appointed, gave, and bequeathed "all funds and properties whatsoever or wheresoever which have been or shall be purchased out of the savings of property to which I have been or shall be entitled for my separate use to the same persons, and upon the same trusts, and in the same manner, and as part of the property hereinbefore appointed, and to be applied without multiplying the legacies and provisions hereinbefore appointed and bequeathed."

Mrs. *Rowley* died on the 21st of July, 1872, and in September, 1872, general letters of administration were granted to *J. J. Rowley*. On the 14th of October, 1872, probate was granted limited to such personal estate and effects as the testatrix had, by virtue of the settlement made on her marriage, a right to appoint or dispose of, and had in and by her said will appointed or disposed of accordingly, but no further or otherwise.

Amongst other property left by the testatrix was a balance of £1787 8*s.* 9*d.* at her bankers, the *Sheffield and Rotherham Banking Company*, which balance arose from savings effected by her out of her separate estate.

A suit having been instituted by one of the legatees for ad-

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ministration of the trusts of the will and administration of Mrs. *Rowley's* estate, a decree was made on the 31st of May, 1873, by which an inquiry was directed as to what the funds and property described in Mrs. *Rowley's* will as "purchased out of the savings of property to which she was entitled for her separate use" consisted at her death.

In reference to this item of £1787 8*s.* 9*d.*, one of the executors in his affidavit stated that it consisted of cash which had been, by or by the direction of the testatrix, paid to her account at the *Sheffield and Rotherham Bank*, "the whole of the money so paid in, except the rents of the *Blind Lane* property hereinafter mentioned, arose, I have no doubt, from the property comprised in the settlement made upon the marriage of Mrs. *Rowley* with her second husband. My belief as to the said cash having arisen as aforesaid arises from my being a trustee of the said settlement, and from my having examined the pass-book, and from my not being aware that Mrs. *Rowley* had, and my belief that she had not, any source from whence to derive money other than the said settled property and the *Blind Lane* property. The only money so paid into the said account which did not arise from the said settled property is a few pounds produced by the rents of some freehold property in *Blind Lane*."

In a further affidavit the various items paid to the credit of Mrs. *Rowley's* account were identified as having arisen from her separate estate.

The £1787 8*s.* 9*d.* and interest thereon having been paid into Court at the instance of Defendant *Rowley* and invested, the Defendant now applied, by summons adjourned from Chambers, for payment of the stock representing the £1787 8*s.* 9*d.*, as forming part of Mrs. *Rowley's* general estate.

Mr. *Bagshawe*, Q.C., and Mr. *Kekewich*, in support of the claim by the administrator to the fund as undisposed of, cited *Taylor* v. *Meads* (1); *Johnstone* v. *Lumb* (2); *Humphry* v. *Richards* (3); *Re Rosenthall's Settlement* (4); *Spicer* v. *Dawson* (5).

(1) 4 D. J. & S. 597. 11 Jur. N.S. 166 (3) 25 L. J. (Ch.) 442. 2 Jur. N.S.
(2) 15 Sim. 308. (4) 6 W. R. 139.
(5) 5 W. R. 431. 3 Jur. N.S. 1161; 24 Beav.

Mr. *Kay*, Q.C., and Mr. *W. S. Owen*, for the executors and trustees, contended that the balance at the bank passed under the appointment. A large signification would be given to the word "purchased," which, in its primary meaning, was equivalent to "acquired."

At the death of Mrs. *Rowley* the balance to her credit at the bank, resulting from the savings of her separate estate, was a debt from the bankers, which was purchased by depositing with them these savings of her separate estate, and fell within the description of funds and property purchased out of the savings of her separate estate.

Mr. *Eddis*, Q.C., and Mr. *Cookson*, for the Plaintiff, one of the legatees under Mrs. *Rowley's* will:—

The word "purchase," in its primary sense, means "to acquire;" and "to buy with money or for a price" is a merely secondary meaning: *Latham's* English Dictionary.

SIR JAMES BACON, V.C., said that he could not accede to the argument that "purchased" had exactly the same meaning as "acquired." He must hold that Mrs. *Rowley* had not by her will disposed of that sum of money which was lying as a balance at her bankers. As undisposed personalty this item of £1787 8*s.* 9*d.* was subject to the debts of the testatrix, and passed to her general administrator.

Solicitors: Messrs. *Frere & Co.*; Messrs. *Singleton & Tattershall*, agents for Mr. *W. E. Tattershall, Sheffield*; Messrs. *Dobinson & Geare.*

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1874
Feb. 19.

MILLER *v.* HALES.

[1873 M. 259.]

Practice—Security for Costs.

An officer in Her Majesty's army named as obligor in a bond of security for costs is not an insufficient surety from his regiment being at the time quartered in *Scotland*.

ADJOURNED SUMMONS.

The bill was filed on the 18th of December, 1873, the Plaintiff being therein described as residing at *Leghorn*, in the kingdom of *Italy*.

On the 6th of January, 1874, the Defendant obtained the usual order for the Plaintiff to give security for costs, on the ground of his residence abroad, with the usual stay of proceedings until such security was given.

On the 21st of January the Plaintiff's solicitors sent to the Defendant's solicitors a draft bond, the proposed obligor being described as "*Horatio Gordon Robley*, a captain in H.M. 91st Regt. (Highlanders)."

The Defendant's solicitors wrote, applying for Captain *Robley's* present address and a reference to his bankers.

In answer the Plaintiff's solicitors wrote that the description in the draft bond sufficiently disclosed Captain *Robley's* address, his regiment being at present quartered at *Stirling*, and that (as they understood) he was at present on his way to pay a visit to his sister in *Italy*, but would rejoin his regiment at the expiration of his leave.

The Defendant's solicitors replied that Captain *Robley's* residence at *Stirling* was, in their opinion, a fatal objection to his sufficiency as a surety, as the process of the Court could not reach him in case he failed to fulfil the obligation of the bond, and they called upon the Plaintiff's solicitors to name some other person.

After some further correspondence, in which the Defendant's solicitors adhered to their objection, the Plaintiff's solicitors, on the 4th of February, deposited with the Clerk of Records and

Writs the bond of Captain *Robley*, "now stationed and residing at *Stirling, Scotland*," the attesting witness to the bond being described as residing at *Leghorn*.

A summons was thereupon taken out on behalf of the Defendant, that the Plaintiff might be ordered to procure some sufficient person on his behalf, in lieu of *Horatio Gordon Robley*, to give security according to the course of the Court in a bond of £100 conditioned for payment of costs to the applicant, in case this Court should think fit to award any, with stay of proceedings; and in default of such security being given, dismissal of bill, without further order, with costs.

The Chief Clerk having allowed the objection raised by the Defendant, the summons was adjourned into Court.

Mr. *Macnaghten*, for the Defendant, contended that Captain *Robley's* security was insufficient, as his bond could not be enforced while he remained out of the jurisdiction. Admitting, on the authority of the cases cited in *Daniell's* Chancery Practice (1), that an officer resident abroad as a land or sea officer in Her Majesty's service would not be ordered to give security for costs, it did not follow that he was a sufficient security in a bond given by a Plaintiff residing abroad, not on public service.

Mr. *Kay*, Q.C., and Mr. *Tremlett*, for the Plaintiff, were not called upon.

SIR JAMES BACON, V.C., held, that the security offered was sufficient, as otherwise no officer in Her Majesty's service would be competent to give security. The summons would be dismissed with costs.

Solicitors: Messrs. *Bevan & Whitting;* Messrs. *Parker, Watney, & Clarke.*

(1) 5th Ed. vol. i. p. 28.

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1874
Feb. 26.

PHOSPHO-GUANO COMPANY, LIMITED *v.* GUILD.

[1873 P. 216.]

Practice—Service out of the Jurisdiction—Cons. Ord. x., r. 7.

In a suit to obtain relief against a domiciled Scotchman living at *Glasgow* in respect of certain transactions relating to Plaintiff company, which was registered and carried on business in *England*, and to restrain his dealing with the shares of the company in his possession, the Defendant was served at his office in *Glasgow* under an order obtained *ex parte* for service of copy bill with interrogatories upon him "in *Scotland* or elsewhere out of the jurisdiction of this Court":—

Held, that, having regard to the subject-matter of the suit (shares in a company registered in this country), service out of the jurisdiction had been properly directed, and that, although the order was in terms irregular, the Court would not, after it had been acted upon and service effected under it, discharge it on the ground of such irregularity.

THIS was a motion to discharge an order made in Chambers on the 10th of January, 1874, that the Plaintiff be at liberty to serve a copy of bill (filed the 16th of December, 1873), together with the interrogatories and a copy of order, "upon the Defendant in *Scotland* or elsewhere out of the jurisdiction of this Court." The Defendant, *Guild*, who was a domiciled Scotchman, carrying on business as an accountant at *Glasgow*, had been employed in 1870 as trustee on behalf of the Plaintiff company, then in course of formation in this country, to negotiate the purchase of the works and business at *Seacombe*, near *Liverpool*, of Messrs. *Peter Lawson & Son*, of *London* and *Edinburgh*. The case made by the bill was that *Guild* had obtained a secret benefit from Messrs. *Lawson & Son* by way of bonus, to the prejudice of the company, under an arrangement with Messrs. *Lawson*, by which he was to retain a portion of their commission, payable in shares of the company.

The bill prayed a declaration that *Guild* was liable to account for what he had received, and that he might be compelled to deposit the certificates of the shares in his possession, and be restrained from dealing with such shares in the meantime.

On the 10th of January, 1874, the Plaintiffs obtained, *ex parte* in Chambers, an order that the Plaintiffs be at liberty to serve a copy

of the bill, together with the interrogatories, "upon the Defendant in *Scotland* or elsewhere out of the jurisdiction of this Court;" the affidavit upon which this order was obtained stating that *Guild* was resident at *Glasgow*.

On the 19th of January the Defendant was served at his office at *Glasgow*.

On the 10th of February an order was made on the *ex parte* application of the Defendant, giving him leave to enter a conditional appearance, and on the 18th of February conditional appearance was entered, and notice of motion served to discharge the order of the 10th of January.

Mr. *Kay*, Q.C., and Mr. *Everitt*, in support of the motion, contended that the order, in directing service in *Scotland* "or elsewhere out of the jurisdiction of this Court," was clearly irregular, and not warranted either by Cons. Ord. x., rule 7, or by the terms of the affidavit (stating that the Defendant was residing at *Glasgow*), on which it was obtained. Admitting that the Court has jurisdiction to order service out of the jurisdiction where one of several Defendants resides abroad, *Drummond* v. *Drummond* (1), such an order is entirely within the discretion of the Court, and will not be made where the only relief sought is a personal decree against this sole Defendant, domiciled and resident out of the jurisdiction, and which could only be enforced by process of the Scotch Courts, where, and not here, the Defendant ought to have been sued.

Mr. *Jackson*, Q.C., and Mr. *Bedwell*, for the Plaintiffs:—

That part of the order which directs service in *Scotland* is perfectly valid and regular, and having been acted upon will not now be discharged on the ground of the additional words, "or elsewhere," which have not been acted upon; and if the order were discharged, a new order, omitting these words, would at once be applied for and obtained. The relief sought by the bill is not merely personal against the Defendant, as it seeks to have him declared a trustee on behalf of the company, and to restrain him from dealing with the shares, which are property in this country

(1) Law Rep. 2 Ch. 32.

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within the jurisdiction of this Court, and, in a suit in respect of which the Court has express power by 4 & 5 Will. 4, c. 82, to direct service out of the jurisdiction, independently of the decisions upon the subsequent General Order of May, 1845 (re-enacted as Cons. Ord. x., r. 7), by which this right of service is established, and extended to any suit: *Drummond* v. *Drummond* (1); *Maclean* v. *Dawson* (2).

Mr. *Kay*, in reply:—

A Plaintiff applying *ex parte* is bound to take the order at his own risk, and such an order only as he can abide by; and as the order obtained is admittedly irregular, the Defendant is entitled to have it discharged.

SIR JAMES BACON, V.C:—

There was an irregularity in the terms of this order as drawn up, for it ought to have been confined to service in *Glasgow*, where in the affidavit the Defendant is stated to be resident. But I shall not now discharge the order, as it has been acted upon, and the Defendant has been served in *Glasgow* under it. The bill relates to certain shares, the property of a company, registered in *England*, within the jurisdiction of this Court. The subject-matter of the suit is in this country, and the relief prayed is not merely personal against the Defendant. Service has, under the rule of the Court, been properly ordered to be made on the Defendant out of the jurisdiction, and the motion to discharge the order must be refused. No order as to costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Clarke, Son, & Rawlins.*

(1) Law Rep. 2 Ch. 32. (2) 27 Beav. 21; 4 De G. & J. 150, 156.

5 Jur. N.S. 663.

BECKETT *v.* BUCKLEY.

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1874
Jan. 27.

[1872 B. 162.]

Judgment Debt—Elegit—Equity of Redemption—Bill by Judgment Creditor for Redemption and Foreclosure—Law of Judgments Amendment Act (27 & 28 *Vict. c.* 112), *ss.* 1, 4.

On a bill filed against mortgagees and mortgagor, who was also a judgment debtor, by a judgment creditor who had issued a writ of elegit against the goods and hereditaments of the judgment debtor, but the execution of which, in consequence of the mortgages, could not be proceeded with, for accounts, redemption, and foreclosure, the ordinary redemption and foreclosure decree was made, notwithstanding the provisions of the statute 27 & 28 Vict. c. 112.

THE Defendant *William Bott* was entitled in fee to premises, subject to mortgages and charges in favour of the other three Defendants, the legal estate being vested in the first-named Defendant, *Thomas Buckley*, who had the title deeds. In January, 1872, the Plaintiff obtained judgment in an action against the Defendant *William Bott* for the recovery of a sum due; the same was subsequently registered in the Common Pleas, and the Plaintiff caused a writ of elegit to be issued; but in consequence of the existence of the mortgages and charges above referred to, and of the title deeds being in the possession of the Defendant *Thomas Buckley*, he was impeded in procuring the sheriff to proceed with the further execution of the writ of elegit, and could not procure the hereditaments to be delivered in execution to him. The writ of elegit had been registered under the provisions of the statute "to further amend the law of property" (23 & 24 Vict. c. 38), and the statute "to amend the law relating to future judgments, statutes, and recognizances" (27 & 28 Vict. c. 112). There was due to the Plaintiff, in respect of his judgment, the sum of £64 18*s.* 2*d.*, and interest and costs; and as the Defendants, the mortgagees, threatened to sell the hereditaments, and to pay over the balance of the purchase-money, if any, after paying the sums due on the mortgages, to the Defendant *William Bott*, this bill was filed by the Plaintiff for accounts of what was due to the mortgagees; and that he, upon paying what might be found due, might be let in to redeem and have the herditaments conveyed to him; for an account of what

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was due to himself by virtue of his judgment, and that in default of payment to him of the sum found due and the sums paid by him to the mortagees, the Defendant *William Bott* might be foreclosed; and for an injunction and consequential relief.

Mr. *Lindley*, Q.C., and Mr. *S. H. Blackmore*, for the Plaintiff, referred to *Mildred* v. *Austin* (1) and *Hatton* v. *Haywood* (2), and contended that he had taken the proper course, and that he was entitled to the decree which he asked.

Mr. *Simmonds*, for the Defendant *William Bott*, submitted that the proper course for the Plaintiff to pursue was to have filed a bill in the first instance against the mortgagees for redemption only, and then to have proceeded by a petition under the 27 & 28 Vict. c. 112, s. 4, for a sale or foreclosure of the premises, as by sect. 1 of that statute it was expressly enacted that a judgment creditor should not, after the passing of the Act, acquire a charge upon the land of the judgment debtor until he should have taken it in execution; and, therefore, until the Plaintiff should have done that, he could have no *status* for the purpose of commencing proceedings for redemption and foreclosure against the judgment debtor. The Plaintiff must make his judgment a lien before he could acquire any right to take these proceedings. He could not ask for this decree before he had a title to sue, nor could he, by the same bill, ask for a decree giving him a charge, and also ask to be let in to redeem and foreclose. At present the Plaintiff had not a charge upon *William Bott's* land, and until he had a charge he could not properly make *William Bott* a party to a bill which sought to affect it. He referred to *In re Cowbridge Railway Company* (3), and also to *Hatton* v. *Haywood*.

Mr. *J. W. Chitty*, and Mr. *Sturges*, appeared for the other Defendants.

SIR CHARLES HALL, V.C.:—

I think it would be a stretch of the language of the statute (27 & 28 Vict. c. 112, s. 4) if I were to hold that such a bill as this could not be maintained, it having been decided in *Hatton* v. *Hay-*

(1) Law Rep. 8 Eq. 220. (2) Law Rep. 9 Ch. 229.
(3) Law Rep. 5 Eq. 413.

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wood (1) that the proper course for a judgment creditor to pursue where the legal title is outstanding is to come to the Court by a bill and ask to be allowed to remove the obstacle which prevents him from enforcing his inchoate right; that is to say, to redeem the mortgage which stands in his way. This is a bill to redeem and foreclose as against the mortgagor. It is properly framed according to the practice of the Court, and rightly asks to be allowed to enforce a valid claim. There being a right to institute a suit, it would, in my opinion, be contrary to reason and justice if I compelled the Plaintiff to go through the double process of filing two bills, or to file one in the first instance to obtain a charge, and then to proceed by petition under sect. 4. I think it proper that the two proceedings should be combined in one; and I hold that the Plaintiff is entitled to the ordinary decree for redemption and foreclosure.

Solicitors: Mr. *A. D. Bird,* agent for Mr. *H. C. Lisle,* and for Messrs. *Bellyse & Son, Nantwich;* Messrs. *R. Jones & Co.,* agents for Mr. *T. L. Brough, Stafford.*

HORTON *v.* HALL.

V.-C. H. 1874 Jan. 27.

[1872 H. 70.]

Improved Chief Rents—Land ordered to be sold to pay Arrears accrued since 1853.

Land, on which an improved chief rent, which was purchased by the Plaintiff's testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date.

Taylor v. *Taylor* (2) distinguished.

IN 1831 two pieces of land situate at *Chorlton-upon-Medlock, Manchester,* were sold subject to a chief rent or rent-charge of £11 7*s.*, which was reserved by the vendor upon each piece. In 1834 the purchaser sold the same land to a builder, reserving to himself an improved chief rent or rent-charge of £54 10*s.* Shortly afterwards a portion of the land was sold for the purpose of erecting a church

(1) Law Rep. 9 Ch. 229. (2) *Ante,* p. 324.

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thereon; that portion was enfranchised, and the two chief rents of £11 7*s.* each were reduced to two of £7 16*s.* 11*d.* each; and the chief rent of £54 10*s.* was reduced to £37 13*s.* 6*d.*; and upon the remaining portion of the land no buildings had been erected by the builder, who purchased in 1834. The builder became bankrupt, but shortly before his bankruptcy he executed a conveyance of this land to a trustee upon trust to sell and divide the proceeds among his creditors. The trustee never executed the deed, and ultimately disclaimed the trusts. The chief rent of £37 13*s.* 6*d.* was in 1853 sold by auction to the testator in the cause, but neither he, during his lifetime, nor his trustees (the Plaintiffs), since his decease, had ever received any payment in respect of it, and the arrears now amounted to a sum which, it was alleged, was more than the full value of the land subject to the chief rent.

The Plaintiffs prayed for accounts, and for a declaration that the land ought to be sold to pay the arrears, or so far as the proceeds would extend.

Mr. *Birley*, for the Plaintiffs, referred to *Cupit* v. *Jackson* (1) and *White* v. *James* (2).

Mr. *Jolliffe*, for the Defendant *Yates*, one of the creditors of the bankrupt, submitted that the Plaintiffs were entitled to no more than six years' arrears.

No one appeared for the other Defendants.

SIR CHARLES HALL, V.C.:—

In a recent case before me, *Taylor* v. *Taylor* (3), *Cupit* v. *Jackson* was referred to, and I declined to apply it, because in *Taylor* v. *Taylor* the land charged with the annuities or yearly payments was in strict settlement; but that is not so with the land in this case, and therefore, and having regard to the case of *White* v. *James*, I shall follow *Cupit* v. *Jackson*, and make the order asked for.

Solicitors: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Slater, Heelis, & Co., Manchester.*

Solicitors for the Defendant *Yates:* Messrs. *Bower & Cotton*, agents for Mr. *Thomas Southam, Manchester.*

(1) 13 Price, 721. (2) 26 Beav. 191. (3) *Ante*, p. 324.

BELL *v.* TURNER.

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Jan. 30.

[1872 B. 146.]

Practice—15 & 16 *Vict. c.* 86, *s.* 22—*Adult and Infants Plaintiffs*—*Affidavit sworn Abroad, not before British Consular Agent, allowed to be filed.*

In a suit in which infants jointly with their mother were Plaintiffs, an affidavit, sworn abroad, by the Defendants, not before a British consul or vice-consul, as required by the provisions of the statute 15 & 16 Vict. c. 86, s. 22, but before the burgermeister of the town at which the Defendants resided, was allowed, with the consent of the mother, to be filed.

THIS was a suit by a mother and her children, all infants, for the purpose of making two trustees, one of whom was residing in this country, and the other, a married lady, residing with her husband at, for a long time past, *Weisbaden*, responsible for alleged breaches of trust. The Defendant, the husband, was suffering from serious illness. There was no British consul or consular agent nearer to *Weisbaden* than *Frankfort*. The Defendants, the husband and wife, had made a joint affidavit in the cause, not sworn before or witnessed by a British consul or consular agent, but sworn before the Burgermeister of *Weisbaden*, and his seal was attached to the document.

Mr. *Yate Lee*, for the Defendants, asked, with the consent of the adult Plaintiff, that the affidavit might, under the circumstances, be filed, notwithstanding the provisions of the statute 15 & 16 Vict. c. 86, s. 22. He referred to *Lyle* v. *Ellwood* (1).

SIR CHARLES HALL, V.C., acceded to the application.

Solicitor: Mr. *G. J. Brownlow.*

(1) Law Rep. 15 Eq. 67.

S C in Just Cases W.N. 1872 p. 214

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1874

Jan. 29, 30 31; *Feb.* 11.

DE LISLE *v.* HODGES.

[1873 D. 60.]

Gift of Residue of Specific Fund—Residuary or Specific—Abatement.

By deed and by will two funds of £37,914 and £800 Consols were settled, with powers of varying investments, upon trusts for the nephews and nieces of *R. H.*, subject to a power in *R. H.* of exclusive appointment among them. *R. H.* made and revoked a series of appointments, and ultimately, by a deed-poll in November, 1870, (at which time the fund had been reduced to £27,170 Consols and £8000 cash), *R. H.*, after reciting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named, in the shares and proportions and in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7000 Consols, part of the £37,914 and £800 Consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, *S. H.*, absolutely. *R. H.* then appointed in like manner further sums (making an aggregate of £37,000 Consols), in trust for the four nieces and nephew named; and the residue of the two several sums of Consols or other the stocks, funds, or securities, &c., in trust for his niece *C.* The trust funds at the death of *R. H.* were insufficient to pay the £37,000 Consols:—

Held, that the gift to *C.* was residuary and not specific, and that it failed altogether.

By an indenture dated the 28th of May, 1822, a sum of £37,914 13*s.* 9*d.* Consolidated £3 per Cent. Annuities, standing in the names of three trustees, was settled, subject to the life interests of *Benjamin Hodges* and his son *Richard Hodges*, and in the event, which happened, of there being no child of *Richard Hodges*, "in trust for all and every of the nephews and nieces of the said *Richard Hodges*, being the child and children lawfully to be begotten of *William Robert Hodges*, *Benjamin George Hodges*, *Catherine Mazzinghi*, and *Amelia Ann Whitgreave*, in such part, shares, or proportions, and for any one or more of the said nephews and nieces of the said *Richard Hodges* in particular, and in exclusion of any other or all the others of them, and to be and become a vested interest, and to be paid and payable at such age or ages, time or times, and with under and subject to such powers, provisoes,

restrictions and limitations for the benefit of some or one of the said nephews and nieces of the said *Richard Hodges* as he, the said *Richard Hodges*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation" . . . "or in and by his last will and testament, or any codicil or codicils thereto" . . . "shall, from time to time, or at any time, direct or appoint; and in default of any such direction or appointment, or so far as any such direction or appointment shall not extend, then it is hereby declared and directed that they, the said trustees, and the survivors or survivor of them, his executors and administrators, shall stand possessed of and interested in the sum of £37,914 13*s.* 9*d.* £3 per Cent. Consolidated Bank Annuities, or the stocks, funds, or securities to be substituted in lieu thereof, or such part or parts thereof as shall remain unapplied or undisposed of under the trusts or powers created by these presents, in trust for the nephews and nieces of the said *Richard Hodges*."

After the death, on the 23rd of April, 1827, of *Benjamin Hodges*, and in accordance with the provisions of his will, dated the 5th of October, 1822, and of the 4th codicil thereto, dated the 19th of July, 1823, a sum of £800 Consolidated £3 per Cent. Annuities thereby settled by him on the trusts declared by the indenture of settlement of the sum of £37,914 13*s.* 9*d.* Consols was transferred into the names of the trustees of the settlement.

The settlement contained a power for the appointment of new trustees, and under it there had been divers appointments made. The settlement also contained a power for the trustees, with the consent in writing of *Richard Hodges*, to change the investments, and there was authority to acquire new investments in public stocks or funds, on Government or real securities, or loans, or investments upon such other security as *Richard Hodges* should direct; and under these powers there had been divers sales and re-investments. The Plaintiffs, the present trustees, were, with another, since deceased, appointed trustees of the settlement on the 1st of July, 1853, and at that date the sums of £37,914 13*s.* 9*d.* and £800 Consols were, in consequence of such sales and re-investments, and the payment of certain sums of costs represented by a sum of £27,170 15*s.* 4*d.* Consols and £8000, invested in the mortgage of an estate belonging to *Richard Hodges*. *Richard Hodges*, who had

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made divers appointments of the funds, all of which he afterwards revoked, executed a deed poll dated the 30th of November, 1870. In that deed there were recitals of previous appointments in which were reserved powers of revocation. According to those recitals, each of the prior appointments recited that *Richard Hodges* was desirous of appointing the two original trust funds amongst his nephews and nieces in the shares and proportions thereinafter expressed, and the operative part of each appointment was expressed to be for the purpose of carrying the said desire into effect, and in consideration of the natural love and affection which *Richard Hodges* had for his nephews and nieces thereinafter named. The funds appointed by such prior appointments were, according to the recitals thereof, the two funds, and according to such recitals, the powers of revocation, and the revocations and appointments mentioned those two funds only, although there had been, before all, except the first of such appointments, the change of investment above mentioned. There were also recitals in the deed poll of November, 1870, of the desire of *Richard Hodges* to revoke the then subsisting appointment of the two funds and to appoint the same amongst his nephews and nieces thereinbefore named in the shares and proportions and in manner thereinafter expressed. The first operative part of the deed revoked the last preceding appointment of the two funds, and the second operative part, after stating that it was in pursuance of the said desire and in consideration of the natural love and affection which *Richard Hodges* had for his nephews and nieces thereinafter named, was as follows:—

"That from and immediately after his decease the trustees of the indenture of May, 1822, should stand and be possessed of and interested in the said sum of £37,914 13*s.* 9*d.* Consolidated £3 per Centum Annuities so standing in their or some or one of their names in the books of the Governor and Company of the *Bank of England*, or other the stocks, funds, and securities of which the same now consist, or hereafter shall or may consist, or upon which the same, or any part or parts thereof, is now or hereafter shall or may be invested, upon the trusts and for the intents and purposes hereinafter expressed and contained of and concerning the same." And also, that from and immediately after his decease the same trustees, or the trustees of the will and codicil of his late father,

Benjamin Hodges, "shall stand and be possessed of and interested in the said sum of £800 Consolidated £3 per Centum Annuities so standing in their or some or one of their names in the books of the Governor and Company of the *Bank of England*, or other the stocks, funds, and securities of which the same now consist, or hereafter shall or may consist, or upon which the same or any part or parts thereof is now or hereafter shall or may be invested, upon the trusts and for the intents and purposes hereinafter expressed and contained of and concerning the same; that is to say, provided always, and I, the said *Richard Hodges*, do hereby declare that the direction and appointment of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities is so made, and the said two several sums shall be held by the said trustees or trustee, or other the trustees or trustee for the time being, upon the trusts and for the intents and purposes following, that is to say, as to the sum of £7000 Consolidated £3 per Centum Annuities, part of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew *Sydney Hodges*, son of my brother *William Robert Hodges*, his executors, administrators, and assigns absolutely. And as to the further sum of £7000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece *Julia George*, daughter of my said brother *William Robert Hodges*, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or any future husband. And as to the further sum of £7000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, and securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece *Josephine Amelia* Baroness *French*,

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daughter of my sister the Countess *Catherine Mazzinghi*, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or future husband. And as to the further sum of £6000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, and securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece *Teresa Eyston*, daughter of my sister *Amelia Ann Whitgreave*, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or any future husband. And as to the further sum of £10,000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew *Frederick Hodges*, son of my brother *Benjamin George Hodges*, his executors, administrators, and assigns absolutely. And as to the residue of the said two several sums of £37,914 13*s.* 9*d.* and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece *Caroline*, daughter of my said brother *Benjamin George Hodges*, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of any husband with whom she may intermarry."

Then followed a power of revocation, which was expressed to be to revoke the direction and appointment thereby made of the said two several sums, specifying them, but not adding the words "or other the stocks, funds, or securities."

Richard Hodges died on the 25th of July, 1872, leaving him surviving all his said nephews and nieces. The trust funds (at the time of the filing of the bill in April, 1873) consisted of the £27,170 15*s.* 4*d.* Consols, and £8652 2*s.* 5*d.* cash; and as ques-

tions had arisen among the Defendants as to the proportions in which they were entitled to them, the trustees prayed that the rights and interests of the Defendants in these sums of Consols and cash might be ascertained and declared, and that the trusts of the sums of £37,914 13*s.* 9*d.* and £800 Consols might be carried into execution under the direction of the Court; and for consequential relief. The trust funds had been paid into Court and invested, and were represented by a sum of £35,819 8*s.* 4*d.* Consols.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the Plaintiffs, stated the facts of the case.

Mr. *Karslake*, Q.C., and Mr. *Cracknall*, for the Defendant *Sydney Hodges*:—

The question resolves itself more into one of language than of law. The case is not like that of the *Attorney-General* v. *Drapers Company* (1), and those referred to in *Hawkins* on Wills (2). The gift is of certain sums of Consols or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested; and a further gift of the "residue," which means if there should be any residue of this uncertain and fluctuating body of securities, liable to be altered from time to time, after all the other previous specifically appointed sums had been provided for. The principle acted upon in *Petre* v. *Petre* (3), where it was held that the residuary gift failed, is applicable to and governs this case; and the decision in *Harley* v. *Moon* (4) bears exactly upon it, and shews that the word "residue" must have its ordinary meaning—the residue after the legacies of £37,000 Consols have been paid.

Mr. *H. R. Young*, for the Defendants Mr. and Mrs. *George*:—

The only questions are, whether the prior appointees are to abate so as to let *Caroline Hodges* take a proportionate part of the funds; or whether she is to take nothing under the gift to her of the residue? In *Oke* v. *Heath* (5) there was an appointment under

(1) 4 Beav. 67.
(2) Page 66.
(3) 14 Beav. 197.
(4) 1 Dr. & Sm. 623.
(5) 1 Ves. Sen. 135.

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a power of a certain sum, upon a condition that the appointee paid an annuity; and of the residue, and a loss was sustained; and Lord *Hardwicke*, acting on the maxim "*Qui sentit commodum, sentire debet et onus*," held that the loss must fall on the residue, and that the £4000 was not to be burthened with any part of it. Supposing the funds in this case had been increased instead of diminished, it would be, and probably successfully, argued that *Caroline* would be entitled to all the "overplus." But however that might be, it is submitted that the rule laid down in that case, and in *Lefevre* v. *Freeland* (1) and *Booth* v. *Alington* (2), practically decides the question here, viz., that the prior appointees must first be satisfied, and then if there should be a residue *Caroline* is to take it. If there should be none (which is the fact) she cannot take any.

Mr. *H. S. Milman*, for the Baron and Baroness *French*,

Mr. *Greene*, Q.C., and Mr. *Romer*, for *Frederick Hodges*, and

Mr. *Leonard Field*, for Mr. and Mrs. *Eyston*—all Defendants in the same interest—were not called upon.

Mr. *Lindley*, Q.C., and Mr. *Bagshawe*, Q.C., for *Caroline Hodges*:—

There is a well-established general rule which is applicable to all cases of this description; and there is nothing in the deed poll to take this case out of that rule. On the contrary, this deed coincides with it. "Residue" in such a case is to be treated as much a part of the fund as the sums appointed. The recitals in all the deeds of appointment, those revoked and the one subsisting, are very important. The appointor treated the two sums of Consols as the one trust fund which he intended to appoint, although in 1853, when new trustees were appointed, the trust funds were a sum of Consols and a sum on mortgage. Those circumstances are also important. He appointed all that he had power over; and though he knew that the two original sums of Consols did not exist, yet he treated them as existing, and he appointed them amongst his nephews and nieces in the shares and proportions and in the

(1) 24 Beav. 403. (2) 6 D. M. & G. 613.

manner thereinafter mentioned. He dealt with a fund which was not subject to any fluctuating charge or to debts, or anything of that kind; but in *Petre* v. *Petre* (1) there was a charge of debts. These trust funds merely depended upon their market value, which of course fluctuates. He appointed the original specific trust funds, and in doing so used a compendious expression—the funds formerly existing, then existing, and which might thereafter exist. The same expression was repeated in regard to each appointee. There was to be a division in shares and proportions. The intention of the appointor was to apportion these funds in proportion to the sums mentioned, and there not being sufficient to pay the appointees in full, there ought to be an abatement: *Page* v. *Leapingwell* (2). If there had been no changes of investments, and certainly if Consols had fallen in value prior to the reinvestment of the £8000 in them, there would have been a residue. But could it be contended in any case that if any of the appointments of the specific sums had failed, *Caroline* would take the *quasi* lapsed share? Certainly not. *In re Harries' Trust* (3), *Sugden* on Powers (4), *Booth* v. *Alington* (5), in which there was no appointment of residue, and *Oke* v. *Heath* (6), are not really applicable to this case; and *Easum* v. *Appleford* (7) may be referred to for the express purpose of getting rid of the argument that the question here is merely one of the meaning of the English language. The residuary appointment applies to a particular part of the original funds. In *Wright* v. *Weston* (8) there was a gift of a certain sum, but an abatement was directed; though the argument there was, as here, that "residue" meant "residue." The appointor here has shewn that his object was apportionment. In *Elwes* v. *Causton* (9) there was an insufficiency to pay the whole of the funds appointed, and all parties had to abate in proportion; so in *Miller* v. *Huddlestone* (10).

[The VICE-CHANCELLOR referred to *Rawlinson* v. *McMahon*, mentioned in *Booth* v. *Alington*.]

(1) 14 Beav. 197.
(2) 18 Ves. 463.
(3) Joh. 199.
(4) 8th Ed. 461.
(5) 6 D. M. & G. 613.
(6) 1 Ves. Sen. 135.
(7) 10 Sim. 274; 5 My. & Cr. 56.
(8) 26 Beav. 429.
(9) 30 Ibid. 554.
(10) Law Rep. 6 Eq. 65.

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The strong points in this case are the intention of the appointor to apportion the two funds amongst his nephews and nieces—that is distinctly mentioned in the recitals—in shares and proportions; that he was not dealing with any funds of a fluctuating nature; and that he appointed in strict conformity with the recitals, for he used in each case the words "further part of the said two several sums." If he had left out the words "or other the stocks, funds, or securities," and had appointed specific sums of the two trust funds, and then appointed the residue of those two funds, or, in other words, had specified the residue as £1714 13*s.* 9*d.*—and for present purposes the appointment ought so to be read—everything would have been plain, and no difficulty would have occurred. The intention would have been manifest that *Caroline* should stand *pari passu* with the others. The appointor was dealing with the trust funds which once existed. He mentioned what they were, and expressed a wish to appoint them as they were, and it is submitted that there ought to be a declaration that *Caroline* is entitled to a proportionate part of those funds, and that the costs of all parties ought to be paid out of them.

[They also referred to *Hewitt* v. *George* (1).]

Mr. *Karslake*, in reply, referred to *Dyose* v. *Dyose* (2), *Vivian* v. *Mortlock* (3), and *Walpole* v. *Apthorp* (4).

SIR CHARLES HALL, V.C.:—

The question in this case is one of construction of the appointment made by the deed poll of the 30th of November, 1870.

[After stating the facts of the case (above set forth), the Vice-Chancellor continued:—]

The trust funds existing at the death of *Richard Hodges* in July, 1872, were and are now insufficient to satisfy the several appointments which precede the last trust, *i.e.*, the one for the appointor's niece *Caroline*. The question is, Is *Caroline* to take nothing and the others to abate, or is the appointment to *Caroline*, although expressed to be of the residue, the same in legal operation as an appointment of £1714 13*s.* 9*d.*, the balance of the two funds,

(1) 18 Beav. 522.
(2) 1 P. Wms. 305.
(3) 21 Beav. 252.
(4) Law Rep. 4 Eq. 37.

or other the stocks, funds, and securities upon which that sum was then or might thereafter be invested?

On behalf of *Caroline* it has been contended that the latter is the correct view, and that the present case is to be decided as Sir *William Grant* decided the case of *Page* v. *Leapingwell* (1). In that case Sir *William Grant* held that the testator had clearly shewn that he considered he was dealing with and appointing not less than £10,000, and that the last donee in the series of legatees to whom the "overplus" was given was, under the gift of overplus, entitled to be treated as if he had had given to him a specified sum, *i.e.*, a sum equal, as if the sum had been stated in figures, to the balance of a sum of £10,000, after paying the sums previously given. There not being in fact in that case £10,000, all the beneficiaries were required to abate rateably. It is to be observed that under the gift of "overplus" Sir *William Grant* considered that had there been more than £10,000 the excess would have passed as "overplus."

In *Petre* v. *Petre* (2), a testator having a power of appointment by will over a sum of stock bequeathed two sums of £5000 and £5000 sterling thereout to *A.* and *B.*, and the residue to his son. The stock became in equity liable to his debts, and by payment thereof and of the costs of the suit the fund became less than £5500 sterling. The Master of the Rolls held that the pecuniary and residuary legatees were not liable to abate proportionally, but that the residuary gift failed altogether. The Master of the Rolls said (3): "The authority of *Page* v. *Leapingwell* applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which cases it is indifferent, whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of 'residue.' But in this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realized by a sale and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of £7100 sterling, and he had divided it into different pro-

(1) 18 Ves. 463. (2) 14 Beav. 197.
(3) 14 Beav. 200.

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portions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion were called the 'residue,' but that is not the case here."

In *Elwes* v. *Causton* (1), a testatrix bequeathed various sums of her bank stock, part of £9000 like stock, to several legatees, and all the residue of her said bank stock to *C. C.* The stock at her death was insufficient to pay the specified sums. It was held that all these legacies, including the residue to *C. C.*, must abate in proportion. The Master of the Rolls said (2): "I am of opinion that this case comes within the principle acted on in *Page* v. *Leapingwell* (3), which was followed by me in the cases cited. If a man dealing with a sum of stock of a specific amount say, I bequeath so much to *A.*, so much to *B.*, and the rest to *C.*, the fund must be divided in those exact proportions, and if the stock falls short, the loss must be apportioned amongst all the legatees in the same proportion. The distinction between this case and the case cited by Mr. *Lindley* is this, that the latter was the case of a legacy payable out of stock, and there was no gift of the residue, which makes all the difference. If a man says, I have £1500 stock, of this I give £1000 to *A.* and the rest to *B.*, it is the same as if he said, I give £1000 of it to *A.* and £500 of it to *B.*, and both *A.* and *B.* are equally objects of his bounty."

Many other cases were referred to in the argument. I do not refer to them, because most of them had some special circumstances, and the law is really not in question. The question is, Does the deed poll of the 30th of November, 1870, deal with, or, at all events, make an appointment in reference to and regulated by specific funds of an unvarying amount, or does the appointor assume that a given sum will be available, or does the deed poll not so deal, and the appointor not so assume? I think the deed poll does not so deal with the trust fund, and the appointor does not so assume. The appointor, in specifying what each appointee is to take, superadds the words, "or other the stocks, funds, or securities," &c.; such words expressly referring to variations of investment already made or thereafter to be made. I think the present case cannot be brought within the case of *Page* v. *Leapingwell*, and cases of that class. I do not overlook that the two funds

(1) 30 Beav. 554. (2) 30 Beav. 555. (3) 18 Ves. 463.

are more than once (three times) mentioned without the addition of the words, " or other the stocks," &c.; but the places where those words are omitted do not include any of the parts of the instrument in which the particular sums to be taken by each are declared. I do not overlook that the two funds specified would not—and that the appointor, no doubt, knew when the deed-poll was executed—suffice by a considerable sum to provide for the appointees prior to *Caroline*. The appointor commenced his appointments, *i.e.*, made the first recited appointment, when the two specified funds remained unchanged, and he continued to refer to those two funds subsequently to the change of investment. He did not, I think, in terms declare that these two funds should be considered as continuing for the purpose of measuring and apportioning the benefits taken by all the appointees. So to hold would, I think, be to depart from the ordinary meaning and force of the word " residue " upon conjecture, and not upon a construction afforded by intention clearly manifested upon the face of the instrument. I am not, I consider, warranted in treating the words " or other," &c., as merely supplementary and subordinate. Much reliance was placed on the recital mentioning that the appointment was to be in shares and proportions, but this recital is, I think, insufficient to shew that *Caroline* was, at all events, intended to take rateably with the other appointees. On the whole, I hold that the trust funds must be distributed rateably amongst the appointees, exclusive of *Caroline*.

Solicitors for the Plaintiffs: Messrs. *Young, Jackson, & Co.*

Solicitors for the Defendants: Messrs. *Saunders & Hawksford;* Messrs. *Gedge, Kirby, & Millett;* Messrs. *Harting & Son.*

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Feb. 9.

Ex parte LOVERING. *In re* PEACOCK.

Execution Creditor—Trader Debtor—Seizure for Debt above £50—Subsequent Seizure for Debt under £50—Liquidation Petition before Sale—Rights of Second Execution Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), ss. 6 (*sub-s.* 5), 12, 13, 87—*Bankruptcy Rules*, 1870, *r.* 260.

On the 25th of November the sheriff seized the goods of a trader under a writ of execution for £191, and on the 16th of December another seizure was made for a debt of £32. On the 30th of December the debtor filed a liquidation petition. At this time the sheriff was still in possession, but no sale had been made. On the 22nd of January a trustee was appointed:—

Held, that the creditor for the £32 was entitled to proceed to a sale under his execution.

ON the 30th of December, 1873, *John Thomas Peacock*, a trader, filed a liquidation petition in the *London* Bankruptcy Court, and on the 22nd of January, 1874, Mr. *J. F. Lovering* was appointed trustee. Prior to the filing of the petition several executions had been levied on the debtor's goods, but no sale had been made by the sheriff. The first execution was levied on the 25th of November, by some creditors named *Prosser*, for the sum of £191 4*s.* 6*d.* Another execution was levied on the 16th of December, by some creditors named *Greenlees*, for the sum of £32 17*s.* 3*d.* On the 8th of January, 1874, the receiver who had been appointed under the petition obtained an interim order restraining all the execution creditors from proceeding under their executions. On the 30th of January the trustee applied to the Court for an order declaring that the goods seized under the writs belonged to the trustee, and directing the sheriff to withdraw, and for a perpetual injunction restraining further proceedings by the execution creditors. Mr. Registrar *Pepys* referred the case to the Chief Judge.

Mr. *Shortt*, for the trustee:—

If the sheriff were to sell, he would sell under both the writs: *Drewe* v. *Lainson* (1); and then, under sect. 87, he must pay the proceeds of the sale to the trustee. If the sheriff had sold at

(1) 11 A. & E. 529, 537.

once, as he might have done under the first writ, an act of bankruptcy would have been committed, to which the title of the trustee would have related back. The trustee is now entitled to the goods without the necessity of resorting to a sale: *Ex parte Rayner* (1).

Mr. *J. Rose*, for *Greenlees*:—

There is nothing in the *Bankruptcy Act* to affect our rights. Our seizure was made before any act of bankruptcy was committed. We are entitled to realize our security: *Slater* v. *Pinder* (2); *Ex parte Rocke* (3).

Mr. *Shortt*, in reply.

SIR JAMES BACON, C.J.:—

No doubt the question is one of some nicety. It arises by reason of the omission from the present *Bankruptcy Act* of the wholesome and just provisions contained in sect. 184 of the Act of 1849 (12 & 13 Vict. c. 106). All the mischief in these cases has arisen from that omission. I was under the impression that the omission was not accidental, but that the power given by sect. 13 to restrain the proceedings of particular creditors was intended to be a substitute for sect. 184; but that view of mine was entirely overruled by the Court of Appeal in *Ex parte Rocke*, and it was decided that the law is otherwise. The only question I have now to decide is whether an execution creditor for £32, who seized before any act of bankruptcy had been committed, can retain his security; and in view of the decisions in *Slater* v. *Pinder*, and *Ex parte Rocke*, I must hold that he can. I cannot follow the argument that, because the sheriff, if he sells at all, will sell under both the writs, therefore a sale will amount to an act of bankruptcy. I must hold that none of the legal rights of a creditor for £32 are taken away, as sect. 87 does not apply to his case. No act of bankruptcy could be committed by reason of the levy under the first writ until there had been both seizure and sale, and no sale has even yet taken place. In the meantime another creditor, in

(1) Law Rep. 7 Ch. 325. (2) Law Rep. 6 Ex. 228; Ibid. 7 Ex. 95.
(3) Law Rep. 6 Ch. 795.

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the exercise of his common law rights, and unfettered by any statutory provision, levies his execution. There is nothing in the Act to take away his rights. Such is the state of the law; but it is not a case for giving costs.

Solicitors for the Trustee: Messrs. *Fallows & Whitehead.*
Solicitor for the Creditor: Mr. *Henry Smith.*

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Ex parte LOVE. *In re* JAGGER.

Debtor's Summons—Act of Bankruptcy—Condonation—Petition for Adjudication—Arrangement between Debtor and Creditor—Dismissal of Petition—Refusal of Debtor to carry out the Arrangement—New Petition founded on same Act of Bankruptcy—Bankruptcy Rules, 1870, *r.* 39.

A petition in bankruptcy was presented, founded on non-compliance with a debtor's summons. Before the day fixed for the hearing the debtor promised the petitioning creditor to secure his debt and to pay his other creditors. The petition was dismissed for want of prosecution. The debtor then refused to fulfil his promise. The creditor obtained special leave, under rule 39, to present a new petition, and he did so:—

Held (reversing the decision of the County Court Judge), that there had been no condonation of the act of bankruptcy, and that the petition must be heard on its merits.

THIS was an appeal from a decision of the Judge of the *Huddersfield* County Court.

On the 22nd of September, 1873, Mr. *J. A. Love* issued a debtor's summons against Mr. *John Jagger* for an alleged debt of £740 2*s.* 10*d.* *Jagger* did not comply with the summons, and on the 16th of October *Love* filed a petition for adjudication of bankruptcy against him. The 30th of October was fixed for the hearing of the petition, and on the 29th of October *Jagger* gave notice of his intention to dispute the petitioning creditor's debt. On the 30th of October an order was made extending the time for shewing cause against the petition, and adjourning the hearing till the 4th of November. On that day the hearing of the petition was again adjourned to the 8th of November on the application of the petitioning creditor. Negotiations then took place between *Love* and *Jagger*, the result of which was that *Jagger* promised to execute

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a mortgage to secure *Love's* debt, and to pay all his other creditors. In consequence of this arrangement *Love* did not appear on the 8th of November to prosecute his petition, and an order was made dismissing it. *Jagger* afterwards refused to carry out this arrangement and proceeded to get rid of his property, and on the 9th of December *Love* made an *ex parte* application to the Court, under rule 39 of the *Bankruptcy Rules*, 1870, for special leave to file a second bankruptcy petition against *Jagger*, founded on the same act of bankruptcy. This leave was given, and the petition was filed on the same day. On the 15th of December *Jagger* gave notice of his intention to dispute the validity of the petitioning creditor's debt and the act of bankruptcy. The petition came on for hearing on the 19th of December, when the Judge dismissed it, on the ground that, the former petition having been dismissed for want of prosecution, the act of bankruptcy was exhausted, and no further proceedings in bankruptcy could be grounded upon it. Mr. *Love* appealed.

Mr. *De Gex*, Q.C., and Mr. *Robson*, for the Appellant:—

There has been no *res judicata;* the case is like a nonsuit in an action. The act of bankruptcy was complete, and there was nothing more than a conditional condonation of it. The condition has not been fulfilled. An act of bankruptcy can only be purged by payment, or what is equivalent to payment. The old law in this respect has not been altered by the Act of 1869.

Mr. *Morten*, for the alleged debtor:—

This is a case, not of nonsuit, but of verdict for the Defendant. The creditor should have asked to have the hearing of the first petition adjourned till it was seen whether *Jagger* fulfilled his promise. Not having done so, he must suffer the consequences of his own negligence. The act of bankruptcy has been clearly condoned; the summoning creditor alone could avail himself of it. Rule 39 was not intended to apply to the act of bankruptcy which results from non-compliance with a debtor's summons.

SIR JAMES BACON, C.J.:—

This case is one of considerable importance as regards the practice of the Court. Unless the rules of the Court justify a

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very flagrant injustice on the part of this debtor, the proceedings in bankruptcy ought to be prosecuted against him. It may be of great importance to the general body of the creditors that this should be done; and, on the other hand, the way in which the debtor has dealt with his property may be prejudicial to all, or at any rate to some, of the creditors. The first thing I have to do is to consider the provisions of the Act of Parliament. The 6th sub-section of sect. 6 makes the failure to comply with the requirements of a debtor's summons an act of bankruptcy, and then sect. 7 points out the way in which the debtor may get rid of the summons. In the present case it is clear from the evidence that the creditor has complied with the requisites of sect. 6 (sub-sect. 6), and it is equally clear that when the prescribed time had elapsed, the debtor had not complied with the requirements of the Act, and a petition in bankruptcy was presented against him. Then some arrangement was come to between him and the creditor that the debtor would secure that creditor's debt and satisfy all his other creditors. Afterwards, he neglected to perform that promise, though upon its being made the bankruptcy petition had been dismissed. Thereupon the creditor desired to renew the proceedings, but he was prevented from so doing by Rule 39 unless he first obtained the special leave of the Court to present a new petition. That rule has been complied with, and the creditor has obtained the special leave of the Court. The policy of the rule is obvious; the proceeding, once at an end, is not to be renewed without satisfying the discretion of the Court that there is proper ground for doing so. Well, the creditor obtained this leave by the order of the 9th of December, and that order has not been appealed from. Then he presented a second petition, and supported it by the requisite evidence. The debtor gave notice that he intended to dispute the debt and the act of bankruptcy. When the petition came on for hearing the Judge thought that, by reason of the arrangement which led to the dismissal of the first petition, the act of bankruptcy on which it was founded could no longer be resorted to. I think it would be very dangerous to the public interests, as well as contrary to the common sense and honesty of the transaction, so to hold. It is said that the creditor must take the consequence of his own negligence in allowing the first petition to be dismissed. I cannot

find any trace of negligence. I think the creditor has suffered enough in being put to the expense of filing a second petition. I think that every step has been taken in accordance with the Act and the rules. Unless I am to hold that a creditor, who, after the commission of an act of bankruptcy by his debtor in not complying with a debtor's summons, takes the debtor's word for payment of the debt, thereby loses his rights, I cannot support the order of the County Court Judge. The appeal must be allowed. The order must be discharged, and the matter must be remitted to the County Court, that the petition may be heard upon its merits.

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Solicitors for the Appellant: Messrs. *Evans, Laing, & Eagles,* agents for Mr. *E. Sykes, Huddersfield.*

Solicitors for the Debtor: Messrs. *Learoyd, Learoyd, & Peace,* agents for Messrs. *Learoyd & Learoyd, Huddersfield.*

Ex parte OLD. *In re* BRIGHT.

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Liquidation—Duties of Trustee—Payment of Money into Bank—Audit of Accounts — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 30, 125 (*sub-s.* 8).

In a liquidation by arrangement the creditors may, under sect. 125 (sub-sect. 8) of the *Bankruptcy Act,* 1869, prescribe the bank into which the trustee is to pay the moneys which he receives without passing any formal resolution for the purpose, and evidence is admissible of their having done so.

The provisions of sect. 20 of the *Bankruptcy Act,* 1869, as to the audit of the trustee's accounts apply to liquidation by arrangement as well as to bankruptcy.

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THIS was an appeal from a decision of the Judge of the *Neath* County Court.

On the 5th of November, 1870, *Joseph Bright,* a commission agent at *Briton Ferry,* filed a liquidation petition. His statement shewed a total indebtedness of £1320 3*s.* 5*d.*, and assets estimated as worth £580. On the 21st of November, 1870, the creditors, at their first meeting, resolved upon a liquidation, and appointed Mr.

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Charles Old trustee, and Mr. *William Randall* inspector. Mr. *Old* was the manager of the *Neath* branch of the *Provincial Banking Corporation, Limited,* who claimed to be creditors of *Bright* for £208 19*s.* 2*d.*, the balance of a debt of £508 19*s.* 2*d.*, for which they held as security a mortgage of the lease of a house belonging to *Bright,* which security was estimated as worth £300. On the 26th of November, 1870, *Old* opened an account with the *Neath* branch of the *Provincial Banking Corporation, Limited,* in his own name, as trustee of *Bright's* estate, to the credit of which account he paid all moneys received by him on account of the estate, and he made all payments on account of the estate by means of cheques drawn upon the account so opened. There was considerable delay in realizing the estate, partly because one of the assets consisted of a book debt of £124 due to the debtor from a Mr. *Hughes,* who resided in *Antigua.* The trustee endeavoured to recover this sum, but was unsuccessful. Meanwhile the accounts of the trustee were never audited, and no dividend was declared; the inspector never made any application to the trustee for this purpose. On the 29th of March, 1873, Mr. *T. H. Thomas,* one of the creditors, applied to the trustee for an account of the estate, and was informed in reply that the trustee had £192 9*s.* in hand available for dividend, which sum was standing to the credit of the estate in the books of the bank. On the 16th of June, 1873, the trustee convened by circular a meeting of the creditors, for the purpose, *inter alia,* of declaring a first and final dividend. This meeting was held on the 24th of June, and at it the trustee presented a statement of account, which shewed that he had received on behalf of the estate various sums amounting to £322 19*s.* 8*d.*, and that he had expended £100 10*s.* 6*d.*, leaving a balance of £222 9*s.* 2*d.* The trustee stated that *Hughes's* debt was still outstanding, and explained what steps he had taken to realize it. The creditors present unanimously agreed that Mr. *Tennant,* a solicitor, should take the matter in hand, and that the meeting should be adjourned till he had received a reply from *Antigua.* The trustee then expressed his desire to declare an immediate dividend; the creditors, however, resolved that no immediate dividend should be declared, but that the money in the trustee's hands should be transferred to a deposit account in the same bank. This was done the next day.

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On the 27th of September, 1873, on the application of the inspector, the Judge ordered that Mr. *Old* should be removed from the trusteeship; that he should pay the costs of the application; that he should forthwith pay into the *Bank of England* the sum of £222 9*s.* 2*d.*; that he should be disallowed all remuneration for acting as trustee; that the Registrar should inquire and certify to the Court what sums of money exceeding £50 *Old* had kept in his hands for more than ten days during the time of his acting as trustee, and what was the amount of interest thereon, at the rate of 20 per cent. per annum, during such his detention. On the 30th of October notice was given of an application to the Court to set aside the mortgage to the bank, but this attempt was afterwards abandoned by the inspector. The matter came before the Judge again on the 22nd of December, upon the certificate of the Registrar, and upon an order for a rehearing which had been made on the application of *Old;* and an order was then made, in substitution for the order of the 27th of September, that *Old* should forthwith pay to the credit of *Bright's* estate the sum of £49 13*s.* 4*d.*, being the amount of interest, at the rate of 20 per cent. per annum, on the various sums of money exceeding £50 which *Old* had kept in his hands for more than ten days; that *Old* should pay his own costs of the applications to the Court; that *Randall's* costs should be allowed out of the estate; and that *Old* should forthwith proceed to wind up the estate so far as practicable.

From this order *Old* appealed.

From the evidence on behalf of *Old* it appeared that at the first meeting of the creditors, on the 21st of November, 1870, after his appointment as trustee, he stated that it was his intention to pay all moneys received by him on account of the estate to an account to be opened at the *Neath* branch of the bank, and that the creditors assented to this course, though no formal resolution to that effect was passed by them. The Chief Judge thought that this fact was satisfactorily established by the evidence.

Mr. *Roxburgh*, Q.C., and Mr. *G. W. Lawrance*, for the Appellant:—

This being a case of liquidation by arrangement, the creditors

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sufficiently prescribed the bank into which the trustee was to pay the money which he received. There is no ground for saying that he kept any of the money which belonged to the estate in his own hands, and no ground for charging him with interest. Sect. 30 does not apply to liquidation.

[They were stopped by the Court.]

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the inspector:—

By virtue of sect. 125 (sub-sect. 9) the provisions of sect. 30 are made applicable to liquidation by arrangement. There was no proper prescribing by the creditors, under sect. 125, sub-sect. 8, of the bank into which money was to be paid by the trustee; it ought, therefore, to have been paid into the *Bank of England*, and as it was not, it must be treated as having been kept in the trustee's own hands. The trustee was guilty of great neglect, and ought at any rate to suffer in the matter of costs.

Sir James Bacon, C.J.:—

The trustee ought not to make any use for his own purposes of the moneys which come to his hands, nor to deal with them in any way which can cause a reasonable suspicion:—[His Lordship referred to sect. 30 and sect. 125, sub-sect. 8, of the *Bankruptcy Act*, 1869:—] Nothing is said in sub-sect. 8 about the creditors passing any resolution; it simply says that they "may prescribe the bank" into which the trustee is to pay the money which he receives. In this case I think the evidence is conclusive that the creditors did, at their first general meeting, prescribe that the trustee should pay the moneys received by him to the *Neath* branch of the *Provincial Banking Corporation*, and that that direction has been properly followed by him. An account was opened there, not in his own name simply, but an account which earmarked the money paid to it as belonging to the trust estate. The trustee could not then, unless he committed a fraud, use the money paid to the credit of that account as his own. I think both the letter and the spirit of the Act have been complied with, and that there is no ground for charging the trustee with interest. He cannot be said to have kept the money in his own hands, or to have dealt with it in any way improperly. But

this order for payment of interest is not the only wrong which has been done in the present case. Nothing was for a long time done in the liquidation except that ineffectual attempts were made to recover the debt due from *Antigua*. Then, in June, 1873, a meeting of the creditors was called by the trustee. The meeting was held; accounts were rendered by the trustee, and all the facts were stated from the beginning of the liquidation. The inspector, whose duty it was, under sect. 20, to audit the accounts every three months, had remained perfectly supine; and, on the other hand, the trustee did not submit his accounts for audit. Neither of them can complain of the conduct of the other; they have both neglected their duty. Then *Randall* raised a suggestion that the mortgage to the bank was a fraudulent preference, and that *Old*, by reason of his position as an officer of the bank, could not hold an even hand in the investigation of this question. If the case thus suggested had had any foundation, it would have been easy for the Judge to direct an inquiry into the facts. He made the order to remove the trustee under a mistake as to the facts, and on the re-hearing he said that the facts were so changed that he would not abide by his original order. The inspector, who was the author of the suggestion that the security of the bank was invalid, admitted that he had made inquiry into the facts, and that he found the transaction to be one which was wholly unassailable. There remained, then, only the question respecting the balance in the trustee's hands. The creditors, at their meeting in June, 1873, agreed that this balance should be placed on a deposit account with the same bank; they adopted what had been done. This adoption, could not, of course, countervail the express provisions of the Act of Parliament. But in a case of liquidation by arrangement, where the spirit of the Act is that the creditors shall manage their own affairs, I think that the mode of dealing which has been adopted is in accordance with the provisions of the Act. What benefit could the trustee have hoped to derive for himself or for his employers from the payment of the £222 into the bank of which he was the manager? All this lengthened litigation has been carried on for no useful purpose whatever. It is not to be endured that the money of the credi-

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tors should be swallowed up, and the time of the Court wasted, in disputes of this kind. It is my determination to guard, as far as I can, against such abuses. I therefore discharge the order of the 22nd of December, so far as it directs the payment of interest by the trustee. The trustee must, however, bear his own costs of the application, but I discharge that part of the order which gives *Randall* his costs out of the estate. The trustee has in truth and honesty, though he has not in form, discharged his duty.

Mr. *Roxburgh*:—If I had been heard in reply, I should have contended that the provision of sect. 20 as to the audit of the trustee's accounts once in three months does not apply to liquidation by arrangement.

SIR JAMES BACON, C.J.:—I hold that it applies as much to liquidation as to bankruptcy.

Solicitors for the Appellant: Messrs. *Norris, Allens, & Carter*, agents for Mr. *Tennant, Aberavon.*

Solicitors for the Respondent: Messrs. *Vizard, Crowder, & Co.*, agents for Mr. *R. T. Leyson, Neath.*

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V.-C. M.

1873

[1873 D. 28.]

Nov. 22; *Dec.* 3, 4, 20.

Will—Illegitimate Children—Gift to Children held to apply to reputed Children.

A testator gave all his real and personal property to his wife, *M. D.*, in trust to apply the same to her own personal use for life, and he left her at liberty to dispose of the property amongst their children by will as she should think fit; and, should she make no will, he desired that the property existing at her death should be divided equally between his children by her. The testator had two illegitimate children by *M. D.*, who were recognised by him and baptised as his children, and he had married her the day before he made his will. There were no children born after the marriage:—

Held, that the two illegitimate children were the objects of the power of appointment to *M. D.*, and that they would take as the children of the testator by her in default of her executing the power.

Joseph Alexander Dorin made his will, dated the 30th of April, 1864, in the following terms: "I bequeath all I possess, real and personal property, to my wife, *Margaret Christiana Dorin*, in trust, that she shall apply the same to her own personal use during the term of her natural life. And I leave her at liberty to direct the disposal of the property amongst our children by will at her death, in such manner as she shall think fit; and should she make no will I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her. And I nominate my said wife, *Margaret Christiana Dorin*, to be the sole executrix of this my will."

The testator died on the 22nd of December, 1872, and the will was proved by his widow, the Plaintiff, who was now his sole legal personal representative. He died seised of a freehold house at *Bayswater*, and possessed of personal property of the value of about £23,000.

The testator was twice married. By his first marriage he had two children, both of whom died before the date of the will. One of these children died intestate, and without issue; but the other, a son, left issue an only child, the Defendant, *Arthur Frederick Dorin*, who was now his heir-at-law and next of kin.

By the Plaintiff, with whom he intermarried on the 29th of

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April, 1864, the day before the date of his will, he had two illegitimate children, that is to say, the Defendants, *Charles Alexander Dorin* and *William James Dorin*, both of whom were born previous to the marriage; the elder of the two in November, 1855, and the younger in May, 1861. They were consequently infants of the respective ages of eighteen years and twelve years.

Difficulties had arisen as to the extent of the interests of the persons beneficially interested under the will. This bill was therefore filed by the testator's widow for the administration of his estate, and that the trusts of the will might be declared, and might be carried into effect under the direction of the Court.

It appeared from the evidence that the testator was married to his first wife, *Anna Patton*, at *Calcutta*, on the 12th of April, 1823. That he continued to live with the said *Anna Dorin* in *India* for many years, until she left him and came to *England*. That the testator also returned to *England* in the year 1840, and remained until 1842, during which time he lived with his wife, *Anna Dorin*. He then went back to *India*, and there formed a connection with the Plaintiff, who was then the widow of a Mr. *Twentyman*, and he lived with her until his final return to *England*, in June, 1858. He had had one child by Mrs. *Twentyman* while in *India*, namely, the Defendant, *Charles Alexander Dorin*. Upon the testator's return home he again resided with his wife, *Anna Dorin*, until the month of October, 1859, when he lived only partially with her, and was frequently absent in *London*, residing during those periods with the Plaintiff, until the death of *Anna Dorin*, which took place on the 9th of April, 1863.

The Defendant, *William James Dorin*, the second son of the Plaintiff by the testator, was born in *England*, in May, 1861, and both these children were baptized in a Roman Catholic chapel in *London*. There was an affidavit by *John Bonus*, a Roman Catholic priest, to the effect that, according to the rules and practice of the Roman Catholic Church illegitimate children cannot be baptized in their father's name without his consent, and that the testator gave the witness his consent in writing to the said children being baptized in his name, and that he well knew the testator was cohabiting with the Plaintiff, and that the testator always acknowledged these children, and treated them as his own.

There was further evidence shewing that the testator had always recognised these children and treated them as his own.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Plaintiffs, the trustees, stated the facts of the case.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for the grandson of the testator:—

This is not a case in which any particular interest can be raised on behalf of the illegitimate children of the testator. The hardship lies on the part of the grandson, the son of the only surviving legitimate child. If the property is held to go to the two illegitimate children, then the heir of the testator and his only grandson is unprovided for; on the other hand, if the gift fails, then the grandson will take as heir and next of kin of the testator, after the death of the Plaintiff. The rule as to illegitimate children is laid down in the case of *Warner* v. *Warner* (1). Here there are no words used except "children," and that word signifying legitimate children, it must be taken that no children of the testator by his wife *Margaret Dorin* can take, except legitimate children. In all the authorities upon this subject the question has been whether illegitimate children were sufficiently designated. In *Wilkinson* v. *Adam* (2) the devise was "to the child or children I may have by *Ann Lewis*," who was not his wife. There the testator designated his illegitimate children. It was a necessary implication, that is, so strong a probability of intention, that a contrary intention could not be supposed. *Crook* v. *Hill* (3) was a very peculiar case; the testator chose to designate his daughter as the wife of a man to whom she was actually married, although no valid marriage could ever have taken place between them, as she was his deceased wife's sister, therefore the words could not apply to legitimate children. The testator denoted those particular illegitimate children of his daughter by a particular man, and he knew there could be no legitimate children between his daughter and that man. In the case of *Gabb* v. *Prendergast* (4) the limitation under which illegitimate children were held to take

(1) 20 L. J. (Ch.) 273.
(2) 1 V. & B. 422.
(3) Law Rep. 6 Ch. 311.
(4) 1 K. & J. 439.

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was in a settlement, but it was assumed that the construction of the same words in a will would have excluded illegitimate children born at the date of the will, because of the possibility that legitimate children might be born after the date of the will.

In *In re Brown's Trust* (1) the testator distinctly says that the gift is to include illegitimate children. In order to let in illegitimate children under a gift to children, it must be clear upon the terms of the will itself, or according to the state of facts at the making of it, that legitimate children never could have taken. This is the spirit and meaning of Lord *Eldon's* position in *Wilkinson* v. *Adam* (2), and forms a test by which the claim of illegitimate children is always to be tried.

[They also cited *Jarman* on Wills (3); *In re Sayer's Trusts* (4).]

Mr. *Glasse*, Q.C., and Mr. *Vaughan Hawkins*, for the two illegitimate children of the testator:—

It is impossible to satisfy the words of this will without applying them to the illegitimate children of the testator, which he had had by his wife before his marriage with her. Nothing can be more distinct than the definition of the illegitimate children. They were the only children who could answer the description, and it has often been decided that, where illegitimate children are distinctly pointed out, there the gift to such children will take effect: *Wilkinson* v. *Adam*.

In *Crook* v. *Hill* (5), Lord Justice *James* said, "The question resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed, or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include or not to exclude the children in question as

(1) Law Rep. 16 Eq. 239.
(2) 1 V. & B. 422.
(3) 3rd Ed. vol. ii. 205.
(4) Law Rep. 6 Eq. 319.
(5) Law Rep. 6 Ch. 311, 315.

that a contrary intention cannot be supposed." Then he looks to the facts which surrounded the testator when he made his will. In *Beachcroft* v. *Beachcroft* (1), it was held that parol evidence might be given to shew who the testator considered in the character of children. Looking at all the circumstances in this case it cannot be supposed that this testator, by using the words "our children" and "my children by her," could mean any other children than those he and she then had. The case of *Owen* v. *Bryant* (2), is strongly in our favour, where a testator gave property to be divided among all and every his children by his then wife, and it was held that one child, out of his nine children, who was illegitimate, took equally with the others. So in *Lepine* v. *Bean* (3), where there was a gift by a testator of the residue of his property equally between all his children, and he had no legitimate children, it was held that an illegitimate child living at the date of the will was entitled to the whole property, a subsequently born child being excluded.

Then, in answer to the argument that by deciding in favour of existing illegitimate children it would be excluding subsequently born legitimate children, we submit that even if the testator contemplated the possibility of future legitimate children, there is no rule which should prevent them from taking jointly with illegitimate children. This was clearly stated by the Judges in *Wilkinson* v. *Adam* (4), and *Owen* v. *Bryant* (5).

Mr. *Pearson*, in reply.

Dec. 20. SIR R. MALINS, V.C.:—

The question in this case arises upon the will of *Joseph Alexander Dorin*, dated the 30th of April, 1864, which is in these few words: "I bequeath all I possess, real and personal property, to my wife, *Margaret Christiana Dorin*, in trust, that she shall apply the same to her own personal use during the term of her natural life. And I leave her at liberty to direct the disposal of the property amongst

(1) 1 Madd. 430.
(2) 2 D. M. & G. 697.
(3) Law Rep. 10 Eq. 160.
(4) 1 V. & B. 422.
(5) 2 D. M. & G. 702.

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our children by will, at her death, in such manner as she shall think fit, and should she make no will, I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her. And I nominate my said wife, *Margaret Christiana Dorin*, to be the sole executrix of this my will."

The testator at the date of his will had two children only living, namely, the Defendants, *Charles Alexander Dorin* and *William James Dorin*, and the question is, whether they can take under the description of his children by his wife, they having been born before he had married her.

The general rule that a bequest to the children of the testator, or of any other person, must *primâ facie* be taken to mean legitimate children, is not and cannot be disputed. Whether illegitimate children can take under that description, must depend upon the language of the will itself, or upon that language as interpreted by surrounding circumstances; for in order to ascertain what the testator meant by particular words, it is proper for the Court, as far as possible, to put itself in the position of the testator, and from that position and the surrounding circumstances, to ascertain and interpret the language of his will. It is necessary, therefore, in order to ascertain what this testator meant by "our children" and "my children by her," to look at the situation of the testator when he made his will.

He had been a civil servant in *India*, and had, no doubt, gone to that country at an early age. He had married a Miss *Patton* in 1823; by her he had two sons, both of whom had died before the date of the will, one without issue, and the other leaving an only son, the Defendant *Arthur Frederick Dorin*, who was born in 1846, and who was consequently heir-at-law and sole next of kin of the testator. The first wife of the testator, having been with him in *India*, appears to have returned to *England*, leaving the testator there, in or shortly before 1850, and soon after that the testator began a cohabitation with the Plaintiff, who was then the widow of a Captain *Twentyman*, and he continued that cohabitation in *India* till his final return to *England* in 1858, and the result of that connection was the birth of the Defendant *Charles Alexander Dorin* in 1855. The Plaintiff, with her child by the testator,

came to *England* in the early part of 1858, and was soon afterwards followed by the testator, who then finally took up his abode in this country. Upon his return he lived with his first wife at *Chepstow* for some months, and he continued substantially to live with her up to the time of her death, in 1863, though in the latter part of her life he spent the greater part of his time with the Plaintiff, with whom he always continued his connection from the time of his return to *England*, successfully concealing it from his wife up to a very late period, when the discovery of the intimacy is stated, as might have been expected, to have greatly embittered the latter days of her life. A second child of this illicit connection, the Defendant *William James Alexander Dorin*, was born in 1861, and the testator's first wife having died in April, 1863, he married the Plaintiff on the 29th of April, 1864, and his will, which I have now to construe, was made the day after that marriage, namely, on the 30th of April, 1864.

It is clearly proved in the cause, and was fully admitted by Mr. *Pearson*, as counsel for the grandson, that the testator always acknowledged the two Defendants, who were his illegitimate children by the Plaintiff, as his children. He had them, in fact, baptized as such. This appears by the affidavit of Mr. *Bonus*, a Roman Catholic priest, who baptized the children. He states that, according to the rules and practice of the Roman Catholic Church, illegitimate children cannot be baptized and registered in their father's name without his consent; that he was acquainted with the testator and with the Plaintiff, and was aware that they had cohabited together for some time, but had not then been married, and that the testator gave him a written authority to register the children in his name, and that subsequently the testator had frequently acknowledged that he was the father of *Charles Alexander Dorin* and of *William James Alexander Dorin*, and made no concealment of the fact. Then he proves the extracts from the register of baptisms at the Roman Catholic Church, *Charles Alexander Dorin* having been baptized on the 30th of November, 1858, and *W. J. A. Dorin* on the 26th of July, 1861.

Then there is the affidavit of Mr. *Peter Wood* and Mr. *Wharton Wood*, who say they were intimately acquainted with the testator

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from the time of his return from *India* until his death, and they attended the Plaintiff professionally upon the birth of *W. J. A. Dorin*, and that the testator always acknowledged both the children to be his own, and treated them in all respects as though they had been his legitimate issue. Mr. *Duval* also testifies to the fact that the testator treated both the children as though they had been his legitimate issue, and always acknowledged them to be his, and treated them with great affection; and evidence quite as strong in support of these children having been acknowledged by the testator as his own is given in the affidavits of Mr. *Salter* and Mr. *Miller*.

Under these circumstances, what did the testator mean by the expressions, "our children" "and my children by her"? It cannot for a moment be doubted, and indeed it was fairly admitted by Mr. *Pearson*, that he must have intended the two illegitimate children he already had by the Plaintiff. The intention, then, being clear, it is the duty of the Court to carry that intention, which, as Sir *Thomas Plumer* said, is the polar star of construction, into effect, if it can do so without infringing any principle or settled rule of law. It was argued that, since the testator had, by marrying the mother of these children, put himself in the position of possibility of having legitimate children by her, his will must necessarily be construed as having such children only in his contemplation; but such a construction would, in my opinion, be a violation of his language, which to my mind plainly points to existing and not to future children, though future children might well be included in the gift; and, considering the number of years the connection with the Plaintiff had continued, and that no child had been born for nearly four years, it is most improbable that he had future children in contemplation, and all but impossible that he had such children exclusively in view.

The law is clearly settled that existing illegitimate children may take under the description of children whenever it can be ascertained that it is intended that they should do so. The great leading authority on this subject is *Wilkinson* v. *Adam* (1), which is the one principally referred to in the argument on both sides. In that case, *J. Wilkinson* by his will devised certain estates "to

(1) 1 V. & B. 422.

the use and behoof of the child or children which I may have by *Ann Lewis* (who now lives with me), to be divided equally between them, share and share alike, and his, her, or their heirs for ever." The three Judges who sent their opinion in that case to the Lord Chancellor stated (1): "With respect to the three children who were born before the making of the will, the depositions prove most abundantly that they had then acquired the reputation of being the children of the testator by *Ann Lewis*, and thinking, for the reasons above given, that they were the intended objects of the testator's bounty, we think that they are intended to take the real estate under the will itself, without the aid or explanation of any other papers. It has been argued, though not much pressed, that this devise applies only to future illegitimate children, and is therefore void; but, looking to different parts of the will, we think it clearly appears (if that were necessary) that the testator had in his actual contemplation the illegitimate children who were then born, as well as those whom he might afterwards have by *Ann Lewis*. It was also urged that, as the testator re-published his will after the death of his wife, and when the event of his marrying *Ann Lewis* was thereby brought within his own power, it is fairly to be presumed that under the description of his children by *Ann Lewis* he meant such children as he might have by her if he should afterwards marry her; but we think that in the construction of this devise the intention of the testator is to be collected from the state of things at the time when he made his will, not when he re-published it; and we also think that if the alteration which took place in the interval between the making and re-publishing his will were taken into the account, enough would still remain to shew that his illegitimate children by *Ann Lewis* were the objects whom he had in view."

Then, Lord *Eldon* says (2): "In all the cases that I have seen having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence *dehors*, read, or attempted to be read, with a view to establish, not out of the contents of the will but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case

(1) 1 V. & B. 450. (2) 1 V. & B. 462.

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is supposed to rest upon any evidence out of the will except that which establishes the fact that there were individuals who had gained by reputation the name and character of his children, tha conclusion is drawn without sufficient attention to the grounds on which the judgment is formed; my opinion being, that, taking the fact as established that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this."

It is said that the case of *Beachcroft* v. *Beachcroft* (1) is no longer law; but I do not agree with that. Sir *Thomas Plumer*, V.C., says in that case (2): "In construing a will, the intention is the polar star, and to discover that, the words and context of the will must be considered; but if there is a latent ambiguity, evidence is admissible to shew who the testator was in the habit of considering in the character described in his will. I know of no rule which prevents illegitimate children claiming under a class or description as well as any other stranger. Such children are not prohibited from taking, as by the civil law, and I see no reason to prevent them taking under a general description. It is immoral to become the father of such children, but having them, it is a duty to provide for them; it would be an aggravation of the father's fault not to do so, and, indeed by several statutes, a putative father is compellable to provide for them."

In *Lepine* v. *Bean* (3), the testator, *William Bean*, gave his real and personal estate to trustees on trust to pay the income to his "dear wife *Margaret Bean*" for life, provided she should so long continue his widow and unmarried, and after her death, or second marriage, upon trust to divide the estate between all his children in equal shares. The testator was not married to *Margaret Bean*, but he had a wife named *Elizabeth Bean* living; he had had no children by her, and had always lived apart from her, and she was seventy years of age. *Margaret Bean*, on the contrary, had always lived with the testator, and was recognised as his wife; and he had had four children by her, two of whom had died before the date of the

(1) 1 Madd. 430. (2) 1 Madd. 439.
(3) Law Rep. 10 Eq. 160.

will; one was then alive, and the fourth was born afterwards. These children were all baptized in the name of the testator, and were always known by his name. There the Master of the Rolls held that *Margaret Bean* was entitled to the income of the estate for life if she continued unmarried, and after her death the estate would devolve on the child of the testator and *Margaret Bean* who was living at the date of the will.

Crook v. *Hill* (1) was a case upon appeal from a decision of Vice-Chancellor *Stuart*. There the testator gave certain leasehold estates in trust for his daughter *Mary*, the wife of his son-in-law, *John Crook*, for life, and after her death for such of her children as she should appoint by will, and in default of appointment, for her children who should attain twenty-one. The testator's daughter *Mary* had, with his consent, gone through the ceremony of marriage with *John Crook*, who had been her deceased sister's husband. There were two children of this marriage born before the date of the will, who were recognised as his grandchildren, and at the time of making the will the testator's daughter was *enceinte* of another child who was born after the testator's death. The Lords Justices held (reversing the decision of Vice-Chancellor *Stuart*), that the two eldest children were entitled to take under the gift to children, but gave no opinion as to whether the child born after the date of the will could also take. The decision was affirmed by the House of Lords (2).

I may also mention my own decision in the recent case of *In re Brown's Trust* (3). In that case a fund was given by the testator to trustees to pay the dividends to his daughter for life, and then to transfer the capital equally amongst all the children of his daughter, whether by her present putative husband or by any other person whom she might marry. The testator's daughter had been living, with his knowledge, with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. I held in that case that the illegitimate son was entitled absolutely to the capital. These authorities clearly establish that illegiti-

(1) Law Rep. 6 Ch. 311. (2) Law Rep. 6 H. L. 265.
(3) Law Rep. 16 Eq. 239.

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mate children may take under the description of the children of a particular person when they have acquired the reputation or character of being so, and the Court is satisfied of the intention of the testator that they should take. Both these requisites are, in my opinion, completely fulfilled in the present case, and I am therefore of opinion that the Defendants, who are the illegitimate children of the testator by the Plaintiff, answer the description of "our children" and "my children by her," that is, the Plaintiff, his wife.

But it was contended by Mr. *Pearson* that the effect of giving the property to the two children would be to exclude any legitimate children of the testator's marriage with the Plaintiff; but that would not have been so, for there is no rule which prevents illegitimate and legitimate children taking together as a class where it is intended that they should do so. In this case the words of the will are sufficient to include the future children, and they might therefore have taken if there had been any.

In the case of *Wilkinson* v. *Adam* (1), the Judges said this: "It has been urged against this construction of the devise in favour of the illegitimate children, that, whatever the intention of the testator might be, it was at least a possible event that the testator might survive his wife and marry *Ann Lewis*, and have children by her; in which event those legitimate children would answer the description of the testator's children by *Ann Lewis*, and must necessarily take under the will; and that it is an established and inflexible rule of law that legitimate and illegitimate children cannot take together under the general description of children. We will take the former part of this proposition to be true, and we think it is so. It was possible that the testator might outlive his wife, and marry *Ann Lewis*, and have legitimate children by her: the words of the devise are large enough to include such children; and there appears no express intention to exclude them, though probably the testator had them not in contemplation. We incline to think, therefore, that such children would take under the devise; but the conclusion drawn from thence, that under the circumstances of this case the illegitimate children cannot take with them, is not, as we think, well founded. We think that the illegitimate chil-

(1) 1 V. & B. 454.

dren take, because they were clearly meant; and that if illegitimate children of the description above mentioned would also take, it is because the words are large enough to reach them, and the testator expressed no intention to exclude them, though he did not contemplate their existence. When born they would answer the description of his children by *Ann Lewis;* and being born in marriage, though after the will, the devise would as to them be free from all legal objection."

They then refer to *Cartwright* v. *Vawdry* (1), and *Kenebel* v. *Scrafton* (2), to shew that a contrary doctrine is not established by those cases, and they then say (3): "But if it is an established and inflexible rule that legitimate and illegitimate children can in no case take together under the description of children, we should rather be disposed to say, in the present case, that legitimate children could not take, notwithstanding the generality of the words, than that illegitimate children should be excluded, to the disappointment of the clear and manifest intention of the testator. It is observable that in the present case there are no legitimate children to contend with the illegitimate; but we have reasoned it on the supposition that there were both; as much of the argument was founded on the possibility of that event."

In *Owen* v. *Bryant* (4), Lord *Cranworth* says: "I reject the notion of there being a rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally;" and in *Hill* v. *Crook* (5), before the House of Lords, Lord *Chelmsford* says: "I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children."

I consider, therefore, that I am warranted by authority, as I think I am clearly by principle, in saying, as I do, that the future children of the testator and the Plaintiff, if there had been any, would have been included in this gift.

(1) 5 Ves. 530.
(2) 2 East, 530.
(3) 1 V. & B. 457.
(4) 2 D. M. & G. 702.
(5) Law Rep. 6 H. L. 278.

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There must, therefore, be a declaration that the two infant children are the objects of the power of appointment given to the Plaintiff, and that they take as the children of the testator by her in default of her executing the power. A contrary intention would leave these children, who are clearly shewn to have been the primary objects of the testator's affection, destitute, and would also have the effect of making him die intestate as to the *corpus* of the estate, which it is quite clear he did not intend to do.

Solicitors for the Plaintiff: Messrs. *Freshfields & Williams.*
Solicitor for the Defendants: Mr. *J. B. Batten.*

V.-C. M. 1874 Jan. 12, 13.

In re CORPORATION OF HUDDERSFIELD AND JACOMB.

Arbitration—Award—Limit of Time for Complaint—Last Day of Term—Commencement of Proceeding—Notice of Motion—9 & 10 Will. 3, c. 15—Parliamentary Notice to Landowner—Limits of Deviation—Quantity of Land to be taken—Minerals—Damage by Severance of Minerals.

L.R. 10 Ch. 93
6 C.B.D. 604

The time within which a proceeding for the purpose of setting aside an award under 9 & 10 Will. 3, c. 15, must be commenced, does not include the last day of the term next after the date when the award is made.

Where a submission to arbitration has been made, a rule of the Court of Chancery serving a notice of motion to set aside the award is a sufficient commencement of complaint to satisfy the Act, if the service is made before the last day of the term, next after the time when the award is made.

A Corporation, previously to an application to Parliament for an Act, served the usual Parliamentary notice of their intention to apply for power to take certain land. In the margin of the schedule the property proposed to be taken was referred to as "Property in the line of the proposed work as at present laid out (including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work as delineated upon the plan):—

Held, that the Corporation were not by this statement restricted from taking a greater total breadth than twenty-two yards, provided that what they took was within the limits of deviation prescribed by their Act:

Held, further, that, if necessary, the words "or thereabouts" might be considered to extend the limit to an entire breadth of one-third more than the specified quantity of twice eleven yards.

Held, further, that after a reference to arbitration the landowner was

bound to sell all that was comprised in the notice to treat, whether it was or was not within the compulsory powers of the Corporation.

Where a Corporation were under an Act empowered to make a conduit for water through a field at some distance below the surface:—

Held, that it was not necessary for them to make compensation for damage by severance of minerals where they were not required by the provisions of the *Waterworks Clauses Act*, 1847, to purchase them.

Affirmed by C. of A. 1874

THIS was a motion to set aside an award made between the Corporation of *Huddersfield* and Mr. *Jacomb*, determining the amount of the purchase and compensation money to be paid to him for his interest in certain land taken by the Corporation under the powers of the *Huddersfield Waterworks Act*, 1869 (32 & 33 Vict. c. cx.), which was an Act obtained by the Corporation for the purpose of improving the supply of water to the town.

Section 17 of the Act provided as follows:—

"Subject to the provisions of this Act the Corporation may make and maintain in the lines or situations, and according to the levels shewn on the deposited plans and sections, the reservoirs, lines of pipes, conduits, road diversions, and other works shewn on the deposited plans, with all proper approaches, works, and conveniences connected therewith, and may enter on, take, and use such of the lands described in the deposited plans and book of reference as they require for the purposes of their waterworks undertaking, and may use, get, and appropriate for those purposes all streams and waters shewn or mentioned on the deposited plans as intended to be intercepted or otherwise taken by any of the said waterworks by them, and may stop up all roads and ways within the limits of deviation defined on the deposited plans which are shewn thereon as intended to be stopped up, and may appropriate for the purposes of this Act the sites of roads and ways so stopped up."

Section 19 provided as follows:—

"Where any line of work shewn on the deposited plans passes along any road, and limits of deviation are not laid down thereon, the corporation may, in constructing the works, deviate laterally from the line thereof as laid down on those plans to the extent of the boundaries of the road, and elsewhere the Corporation may, in constructing the works by this Act authorized, deviate laterally

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from the lines thereof as laid down on the deposited plans to the extent of the limits of lateral deviation shewn thereon, but no further in either case except with the consent of the owner of the lands through or in which the deviation is made."

Section 20 gave a power of vertical deviation; and by section 22 they were empowered to take, by agreement, additional land not exceeding ten acres in extent.

Previously to their application to Parliament, the Corporation had deposited in the usual way, in accordance with the Standing Orders of the Houses of Parliament, plans of the lands to be affected by their proposed works. Part of such works comprised a conduit, passing through a farm of thirteen acres, five undivided eleventh shares of which belonged to Mr. *Jacomb*, and the remaining undivided shares to the corporation.

The Corporation had served upon Mr. *Jacomb*, the usual notice to owners, lessees, and occupiers, of their intention to apply to Parliament for power to take a portion of the farm. The schedule to this notice was as follows:—(See opposite page.)

The deposited plans shewed a centre line which was intended to mark the course of the conduit, and limits of deviation extending much further than eleven yards on each side of the centre line.

After the passing of the *Huddersfield Waterworks Act*, 1869, some negotiations took place between Mr. *Jacomb* and the Corporation for the purchase by the latter of the undivided shares of Mr. *Jacomb* in the farm in question, and the Corporation, at one time believing that they had a binding agreement for the purchase of the shares, entered into possession, and commenced to dig some clay which they required for the construction of a reservoir in the neighbourhood. Mr. *Jacomb*, however, filed a bill against them, and ultimately obtained an injunction restraining them from doing acts inconsistent with his ownership of the undivided shares.

The Corporation accordingly, on the 28th of October, 1872, served Mr. *Jacomb* with notice to treat for a portion of No. 129 on the Parliamentary plan, amounting to 1R. 8P., and a portion of No. 130 on the plan, amounting to 3R. 4P., making together 1A. 0R. 12P. Mr. *Jacomb* offered to take £376 for these plots of land, but the offer was not accepted by the Corporation; and on the 31st of December, 1872, having in the meantime filed a bill

SCHEDULE referred to in the foregoing notice, describing the property therein alluded to, and the manner in which the line of the proposed work, as delineated upon the Plan and Section, will affect the same.

	Parish.	No. on Plan.	Description.	Owner.	Lessee.	Occupier.	Description of the Section of the Line deposited, shewing the greatest height of embankment and depth of cutting where the property is intersected by the centre line of the proposed work.		
							Embankment.	Cutting.	Level.
							ft. in.	ft. in.	ft. in.
Property in the line of the proposed work as at present laid out (including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work as delineated upon the plan) .	Almondbury	129	Field .	Yourself .	..	..	..	8 ..	..
		130	Field .	Yourself .	..	..	..	8 ..	..
		151	Field .	Yourself .	..	..	Within eleven yards.		..
		336	Field .	Yourself .	..	..	Within eleven yards.		..
		339	Field .	Yourself .	..	..	..	4 to be	refilled.
		340	Field .	Yourself .	..	..	..	4 to be	refilled.
Property within the limits of deviation intended to be applied for . .	Almondbury	149	Field .	Yourself .	..	..	..	..	..
		150	Field .	Yourself .	..	..	..	..	..

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for partition of the property, they served him with a notice of an appointment by them of an arbitrator on their behalf to assess the amount of the purchase and compensation money payable in respect of his interest in the land proposed to be taken. On the 11th of January, 1873, he also appointed an arbitrator to act on his own behalf, and on the 30th of January, 1873, the arbitrators appointed an umpire.

Between the 8th and 17th of May, 1873, certain letters passed between Mr. *Jacomb's* solicitors and the town clerk of *Huddersfield* with reference to the minerals under the land intended to be taken, which the town clerk considered were not included in the notice to treat, or required to be taken under the 18th section of the *Waterworks Clauses Act*, 1847, Mr. *Jacomb's* solicitors, on the other hand, maintaining that the minerals could not be excluded from the reference.

On the 22nd of May, 1873, Mr. *Jacomb's* solicitors wrote to the town clerk, stating that it had been discovered that the amount of land proposed to be taken, which was a strip ninety-nine feet in breadth, and was entirely within the limits of deviation, exceeded the amount which the Corporation were entitled to take compulsorily, and that Mr. *Jacomb* would not proceed with the arbitration, and had given notice to the arbitrator accordingly.

This view was based upon the supposition that the statement in the margin of the Parliamentary notice limited the Corporation to a breadth of eleven yards on each side of the centre line shewn on the deposited plan, or sixty-six feet in the whole. This point had not been previously raised by Mr. *Jacomb*. The Corporation declined to limit the breadth to be taken within the sixty-six feet so defined.

Previously to notice of this objection being given by Mr. *Jacomb*, the arrangements for holding the arbitration had been completed, and the arbitrators and umpire sat on the 29th, 30th, and 31st of May. At the hearing Mr. *Jacomb* claimed to limit the quantity of land to be taken to the amount of 2R. 35P., which was the portion of the strip claimed within the sixty-six feet limit of breadth. The umpire, after hearing the point discussed, decided that he must either proceed upon the notice to treat or not at all, and he therefore continued the arbitration for the full amount of 1A. 0R. 12P., after taking a note of the objection.

The contention was also raised on behalf of Mr. *Jacomb* that the damage by severance to the mines and minerals under the land taken, and also the damage to the mines and minerals under the land not actually taken, should be assessed. This was objected to by the Corporation, and the umpire decided that, though he would not reject any evidence tendered as to the value of mines and minerals, he would not be influenced thereby in assessing the amount of compensation.

The umpire made his award on the 3rd of June, 1873, and awarded £95 10*s.* for the value of Mr. *Jacomb's* interest in the land taken. The award was taken up by the Corporation on the 20th of June, 1873.

On the 20th of October, 1873, Mr. *Jacomb* wrote to the town clerk intimating his intention to have the submission made a rule of the Court of the Queen's Bench, and asking to have handed to him, or be allowed the use of the appointment of his arbitrator, which was then in the hands of the Corporation. Correspondence on this point continued till the 12th of November, when Mr. *Jacomb* obtained the necessary document, and on the following day he served the Corporation with notice of a summons to produce the appointment of the Corporation arbitrator for the purpose of making the submission a rule of Court, but at the hearing of the summons on the 15th of November the Corporation opposed it, on the ground that they had the previous day made the submission a rule of the Court of Chancery, and the hearing was adjourned till the 18th of November, when the Master by whom it was heard ordered the Corporation to produce a verified copy of the appointment of their arbitrator within two days. The Corporation appealed from this order, and on the 20th of November the appeal summons was dismissed. Mr. *Jacomb* then gave notice of the present motion for the 25th of November, which was the next motion day, and the last day of Michaelmas term. On that day it stood over, on the application of the Corporation, till the sittings after Michaelmas term. Since then the hearing had been postponed, on the understanding that it was to be treated as if it had been brought on during the sittings after term.

The grounds on which it was sought to set aside the award were,

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1. That the notice to treat comprised lands which the Corporation had no power to purchase and take compulsorily. 2. That the damages by severance of the minerals was not taken into account. 3. That, though the Corporation had by their acts elected to take the mines and minerals under the land in question, the value of such mines and minerals was not taken into account in estimating the amount of the purchase and compensation money payable.

Mr. *Higgins*, Q.C., and Mr. *Bagshawe*, for the Corporation, took a preliminary objection to the hearing of the motion :—

The motion is too late. The application is made under sect. 2 of 9 & 10 Will. 3, c. 15 (1). The decisions under that section have established the rule that the words are to be construed strictly against any persons moving to set aside an award, and that the complaint must be actually made in Court before the last day of the term following the time when the award was made: *Reynolds* v. *Askew* (2). The last day of the term will not do: *In re Evans and Howell* (3); and for this purpose it does not matter what is the cause for which the award is sought to be set aside: *Zachary* v. *Shepherd* (4); *Lowndes* v. *Lowndes* (5). The only mode for giving jurisdiction is to make the submission a rule of this Court: *Davis* v. *Getty* (6); *Dawson* v. *Sadler* (7); and no Court but that in which the submission is made a rule has jurisdiction: *Auriol* v. *Smith* (8); *Harvey* v. *Shelton* (9). Even delay in making the submission a rule of the Court will not enlarge the time for setting the award aside: *Ross* v. *Ross* (10); *Russell* on Arbitration (11).

(1) Sect. 2 of this Act is as follows :— "And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term, after such arbitration or umpirage made and published to the parties, anything in this Act contained to the contrary notwithstanding."

(2) 5 Dowl. 682.
(3) 4 Man. & G. 767.
(4) 2 T. R. 781.
(5) 1 East, 276.
(6) 1 S. & S. 411.
(7) Ibid. 537.
(8) T. & R. 121.
(9) 7 Beav. 455.
(10) 16 L. J. (Q.B.) 138.
(11) 4th Ed. p. 661.

Mr. *Cotton*, Q.C., as *amicus curiæ*, referred to *Elliot* v. *South Devon Railway Company* (1).

Mr. *Glasse*, Q.C., and Mr. *W. Barber*, for Mr. *Jacomb*:—

In the first place this motion is not too late, and if it were, the delay is attributable to the Corporation. *Davis* v. *Getty* (2) shews that this Court cannot acquire jurisdiction to set aside an award until the submission is made a rule of the Court, and the Corporation here delayed the necessary steps for making it a rule of this Court, for the purpose of preventing any objection being made on Mr. *Jacomb's* part to the award. This Court will not insist upon the extremely strict construction adopted in *In re Evans and Howell* (3), but will allow the last day of the term as being clearly within the enactment. In *Harvey* v. *Shelton* (4) Lord *Langdale* actually treated the last day of term as sufficient, and in *In re Perring and Keymer* (5) the motion was brought on during the succeeding term.

But, independently of this, the giving notice of motion was a sufficient commencement of a complaint to satisfy the statute. The case is analogous to the three weeks allowed for appealing by the *Companies Act*, 1862. A Court of Equity will take into consideration the reason why the notice was not given for an earlier day.

[They also referred to *Brown* v. *Brown* (6).]

Mr. *Higgins*, in reply:—

In re Evans and Howell is a later decision than *In re Perring and Keymer*, and is express upon the point that the last day of term will not be early enough. The Court has no power to waive the delay: *Smith* v. *Whitmore* (7).

SIR R. MALINS, V.C.:—

This is a technical question, but it may be one of great importance. The motion is one to set aside an award made on a

(1) 2 De G. & Sm. 17.
(2) 1 S. & S. 411.
(3) 4 Man. & G. 767.
(4) 7 Beav. 455.
(5) 3 Dowl. 98.
(6) 1 Yern. 157.
(7) 1 H. & M. 576.

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reference to arbitration. Mr. *Jacomb* was made aware of the award on the 20th of June last, but he allowed the whole period from that time till the month of October to slip away without taking any action. Then in October he took the first steps for making the submission a rule of the Court of Queen's Bench. Pending this process the Corporation made the submission a rule of this Court. There was thus complete jurisdiction in this Court, and Mr. *Jacomb* might have given notice of motion to set aside the award for a day before the last day of term. Therefore there cannot be said to have been great diligence on his part.

But the question I have now to decide is, whether he has not come to the Court too late. The question whether the 25th of November was too late depends upon the construction of the 2nd section of 9 & 10 Will. 3, c. 15. According to the strict grammatical construction of the English language the words "before the last day of the next term" cannot include the last day of that term, and therefore, if the matter were *res nova*, I should decide that "before" must mean before, and that the latest day on which the complaint could be made must be the last day but one of the term. But nothing can be more expressly to the point than the decision in *In re Evans and Howell*. Mr. Justice *Maule* there says (1): "By the statute, therefore, a party in whose favour an award has been made is entitled to the benefit thereof, unless a motion be made to set it aside *before* the last day of the following term. To allow this application would be in effect to repeal the Act."

That is an express decision in the year 1842. But it is said that a different construction has been put upon the Act in the Court of Chancery. I should be slow to come to the conclusion that there could be a difference between law and equity in the construction of a statute. It is said that *Harvey* v. *Shelton* (2) is a decision to this effect. But I do not so regard it. The motion in that case seems to have been brought on upon the last day of term, and it seems to have been erroneously assumed by both parties that the last day of term was soon enough; and it is perfectly clear that *In re Perring and Keymer* (3) was not cited. Therefore on these

(1) 4 Man. & G. 768. (2) 7 Beav. 455.
(3) 3 Dowl. 98.

grounds I come to the conclusion that the last day of a term is too late for the commencement of a complaint.

But another question raised is, as to what constitutes the commencement of a complaint. This is the Court in which the complaint is to be made, and the question must be determined by the nature and course of proceedings in this Court. Notice of motion was served within the statutory time, and if that was making a complaint it was in time. It seems to have been assumed in *Auriol* v. *Smith* (1) that it would be sufficient to take the first step. No doubt the point was not adjudicated upon, but it seems to have been assumed that if a bill were filed, it would have been sufficient. But it is not necessary to file a bill, since a more summary mode of procedure is allowed by motion.

At common law the case is quite different, and no proceeding could be commenced by notice of motion. But surely the complaint began when a notice of the objection was given to the other party, which brought both parties before the Court. I think, therefore, that notice of motion was enough. If I take the analogous case of the *Statute of Limitations*, service of a writ saves the remedy. So a right of appeal is secured by serving the petition of appeal. So also under the *Companies Act*.

Therefore, though I am with the Corporation on the first of these points, I am against them on the second, and the case must be heard on its merits.

Mr. *Glasse*, Q.C., and Mr. *W. Barber*, for Mr. *Jacomb* :—

The arbitration having only continued subject to protest, the right of objecting to the award consequently remains: *Ringland* v. *Lowndes* (2); *Haigh* v. *Haigh* (3). The first ground of objection is to the right of the Corporation to take a greater breadth than sixty-six feet altogether. They may take the sixty-six feet at any part within the limits of deviation, but by the schedule to their notice they have prescribed their limit of quantity. Having therefore taken more than they are entitled to take, and thereby changed the character of the work they proposed to carry out, the award is bad altogether: *Simpson* v. *South Staffordshire Waterworks Com-*

(1) T. & R. 121.
(2) 33 L. J. (C.P.) 337.
(3) 3 D. F. & J. 157.

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pany (1). The award is also bad on account of not allowing any compensation for damage by severance to minerals, or for the minerals themselves, though the Corporation have acted so as to manifest an intention to elect to take the minerals. The *Waterworks Clauses Act*, 1847, clearly contemplated making compensation for damage of all kinds.

Mr. *Higgins*, Q.C., and Mr. *Bagshawe*, for the Corporation, were not called upon.

Sir R. Malins, V.C., after referring to the facts, continued:—

If the meaning of the notice is that the Corporation are to take such part of these fields as they require, Mr. *Jacomb's* case entirely falls to the ground, because it is admitted that they are only taking part of the fields, and that they keep within the limits of deviation, and within the very line of works laid down by the deposited plans. Now if they are entitled to take land for the purpose of constructing their works in that line, or within such deviation from it as Parliament has authorized, Mr. *Jacomb* has entirely mistaken his case, and has no right to be heard whatever. But it is said that is not the meaning of the notice, because in its margin are found the words "Property in the line of the proposed works as at present laid out, including property any part of which is within eleven yards or thereabouts of the centre line of such proposed works as delineated upon the plan;" and it has been contended that they prohibit the Corporation from taking more than a breadth of eleven yards, or thirty-three feet on each side of the cutting. But the meaning of the words, as I read them, is, "Property in the line of the proposed works as at present laid out,"—that is to say, all these fields through which they are to pass. Then the words, "including property any part of which is within eleven yards or thereabouts of the centre line of such proposed works as delineated upon the plan," do not limit them to taking eleven yards wide only on each side of the centre of the works, but require them to give notice to the owners of any property which or any part of which is within the limit. I am clearly of opinion that this notice does not limit the Corporation to taking thirty-three feet

(1) 6 N. R. 184.

in width only on each side, and that if they give notice of their intention to apply for power to take land for the construction of works in the line delineated on the deposited plans, they are at liberty to take any part of those fields which may be necessary for the purposes within the limits of deviation on the deposited plans.

Then the Act is obtained, and it contains this clause:—[His Honour then read the 17th section of the Act, and continued] They are, therefore, at liberty to take such part as they require, for the purposes of their waterworks, of the lands described in the deposited plans and books of reference in which these fields are included. This may, therefore, be taken for the purpose of their waterworks and undertaking. Mr. *William Barber* cited *Simpson* v. *South Staffordshire Waterworks Company* (1), a case which, in my opinion, proceeded upon the plainest possible principle, that where the deposited plans shew that works through a particular property are to be constructed in a particular manner, they must not be constructed in any other manner. In that case the deposited plans shewed that the works were to go through the Plaintiff's estate in a tunnel, and they proposed to make them virtually in an open cutting, and they were restrained by Lord *Westbury* from so doing. And although I was on the losing side as counsel, I have no doubt that the decision was perfectly correct. If, therefore, in this case I had found that the Corporation were limited to taking a breadth of sixty-six feet, and no more, I must have prevented their doing so, if the application had been made in proper time and under proper circumstances. But I shall shew that, in my opinion, it was not made in proper time, or under proper circumstances. But, apart from this consideration, the notice runs, "including property any part of which is within eleven yards or thereabouts of the centre." The expression "or thereabouts" is very indefinite. It may include a large excess or a small excess, but at all events there is some excess to be allowed if necessary, And even if I had thought that the schedule to the Parliamentary notice limited the extent of land to be taken, the meaning must be, eleven yards or so much more as might be reasonably required for the purpose of the works. Then when I look at the Act of Parliament which empowers them to take any part of the lands

(1) 6 N. R. 184. 4 De G. J. & S. 679. 11 Jur. N. S. 453.

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delineated which are necessary for the purpose of the works, assuming them to act honestly and fairly, not vexatiously, but in the exercise of their discretion, I think there is an end of the argument that they are only to take eleven yards on each side.

Now that is my view of the notice served upon the landowners before the Act of Parliament is passed. But let me suppose that Mr. *Jacomb* is right, and that this Corporation had not the power of taking more than eleven yards on each side of the centre of their works, as he contends. They are to take that or thereabouts. The Act of Parliament giving these extensive powers was passed on the 12th of July, 1869. I have read the 17th section, and the 19th gives them the powers of deviating within the limits prescribed, and it is admitted that they have kept within those limits. Then, not until the 28th of October, 1872, Mr. *Jacomb*, who, I must assume, from his conduct in this matter, is most fastidious about his land, and vexatious in his determination that nobody shall take an inch more than he is entitled to, is served with a notice to treat, which in the plainest possible manner, by an annexed plan, shews him what the Corporation intend to take. He might have asked them to mark on the plan the land they proposed to take, and then have raised the objection, or, without going out of his office, he might have applied the compasses to it, as I have just done, and he would have found that it was thirty-three yards wide, while, as he says, they were limited to twenty-two yards. He had notice, therefore, on that day of what was intended to be done, and he made a demand upon them, not for the width he now contends they were alone at liberty to take, but for the identical piece of land included in the notice to treat. His claim was not until the 16th of November following, and surely there was time enough for him to find out this important point. But, instead of raising this question, he demanded £376 for the land described in the notice to treat. The Corporation were not inclined to give that amount. Mr. *Jacomb* therefore claimed that the amount should be settled by arbitration, which was his right as a landowner, and he appointed his arbitrator on the 11th of January, 1873; still, however, to arbitrate on the value of this identical piece of land described in the notice to treat. The Corporation had appointed their arbitrator in the month of December, 1872, and the two arbitrators, on the

30th of January, 1873, appointed an umpire, and between January, 1873, and the end of May in the same year the arbitrators met at least more than once, and all this time Mr. *Jacomb* had a notice to treat, which, if acquiesced in by him, amounted to a contract to sell. If the words "or thereabouts" meant anything, it must have been something more than eleven yards, and it is surely reasonable to say that Mr. *Jacomb* had bound himself that "thereabouts" should include the very piece of land in question. Yet it is only on the 22nd of May, 1873, that he finds out the mistake, and objects to the arbitrators settling for more than the quantity of land which, according to his view, the Corporation was entitled to take. Even if his consent was necessary, I think it is perfectly clear that by the course he had adopted he had bound himself, and was no longer entitled to object to their taking the quantity of land included in the notice to treat, which I am satisfied was strictly necessary for the purpose of the execution of the works. This view would bring into operation the 22nd section of the special Act, which provides that by agreement the Corporation may take any additional quantity of land required for the purposes of the works not exceeding ten acres. Therefore if agreement for sale was wanting here, they have it by acquiescence in the notice to treat and the appointment of the arbitrator; and if I look at the merits, there are no merits. It is a purely vexatious opposition.

I passed over one point, namely, that about the minerals. I ought to have said that it is perfectly clear the arbitrators were right in refraining from entering into any question about the minerals at all; because the 18th section of the *Waterworks Clauses Act*, 1847, prescribes that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the waterworks, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." I think, therefore, that the arbitrators are perfectly right in the view they have taken. If in making these waterworks any minerals were removed, they would be

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taken into consideration, and would be paid for, but beyond that, I agree they were not at liberty to enter into the matter.

Solicitors: Messrs. *Williamson, Hill, & Co.*; Messrs. *Van Sandau & Cumming.*

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In re ECLIPSE GOLD MINING COMPANY.

Winding-up—Old and New Shareholders—Shares Fully Paid and Unpaid Shares—Surplus divisible equally.

A company having called up and exhausted all its capital, raised new capital, on the terms that, in the event of the winding-up of the company, no call should be made on the new shares for any purpose other than for payment of the debts of the company, and that no call should be made for repayment to the holders of the original shares. Upon the company being subsequently wound up voluntarily, there was found to be a surplus after payment of debts:—

Held, that this surplus, though arising from payments by the new shareholders, could not be returned under the above resolution to the new shareholders alone, but must be divided between both sets of shareholders.

The original shares of £1 each were fully paid up, but only 16*s.* had been paid upon the new £1 shares:—

Held, that the surplus must be divided among both sets of shareholders in proportion to the amounts paid up, and that the old shareholders were not entitled to have their shares equalized with the new shares before division of the surplus.

Ex parte Maude (1) distinguished.

THIS was an adjourned summons for the purpose of raising the question which of the shareholders were entitled to a surplus arising in the winding-up of the *Eclipse Gold Mining Company, Limited.*

The company was constituted in 1869, with a capital of £100,000, in shares of £1 each, for the purpose of carrying on mining operations in *California.* In 1872 the capital of the company had been fully called up and exhausted, and they were considerably indebted to their bankers and others. Under these circumstances it was determined to raise a further capital of £50,000, for the purpose of carrying out the object of the company, and this capital was to be raised by the issue of 40,000 new shares of £1 each, and 10,000 bonus shares also of £1 each, the bonus shares to be

(1) Law Rep. 6 Ch. 51.

allotted to the takers of new shares and credited as fully paid up. The new capital was issued in pursuance of certain resolutions duly passed at a special general meeting of the company held in February, 1872. The fourth of the resolutions was in these words: "In the event of the company being at any time wound up before the whole amount of £1 shall have been paid or called up on all the new shares which may then have been issued, such last-mentioned shares shall have the special privilege and advantage that no call shall be made thereon for any purpose other than for payment of the debts of the company which may remain after the realization of all the assets of the company, and for payment of the expenses of winding up the company, and particularly that no call shall be made thereon for the purpose of repayment to the holders of ordinary or other fully paid-up shares, the amount paid up in excess of the amount paid upon such new shares;" and the sixth resolution was: "Except as aforesaid, the new shares and the capital represented thereby shall, for all purposes, be deemed ordinary shares, and part of the ordinary capital of the company."

The holders of the new shares, or the greater part of them, paid 5*s.* per share on allotment, and calls to the amount of 11*s.* per share were afterwards paid, making 16*s.* per share paid up upon the new shares. One of the directors named *Henry Haymen* was largely in debt to the company for calls made upon him in respect of 18,772 new shares which had been allotted to him.

In consequence of this debt by *Henry Haymen*, and other losses, the company became embarrassed; and on the 16th of December, 1872, a resolution was passed for its being wound up voluntarily, and in the course of the liquidation a sum was recovered in respect of the debt due from *Henry Haymen*, which left a surplus of £3500 after all the debts of the company had been paid.

The question now raised was whether the new shareholders exclusively were entitled to this surplus, or whether it was to be divided between the old and new shareholders.

Mr. *Cotton*, Q.C., and Mr. *W. C. Harvey*, for the new shareholders and the liquidator:—

When the new capital in this company was raised, the company

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itself was in a sinking condition, and it was only enabled to be carried on by means of fresh capital. It was reasonable, therefore, that those who contributed towards this object, which was at the time thought to be the only means of saving the company, should have certain privileges not conferred upon the old shareholders; and it was with this object that the fourth resolution was passed, which provided that, in the event of the failure of the business and the winding-up of the company, the new shareholders should not be called upon for contributions towards any object other than the payment of debts, and that no call should be made upon them for the purpose of repayment to the old shareholders. The surplus which has now arisen is derived from payments by the new shareholders, and as it is not required for debts, it should be repaid to the new shareholders. If calls were made upon them for a larger amount than was required for debts, those calls were improperly made, and the surplus, having arisen from the produce of those calls, ought to be returned to the new shareholders alone.

Mr. *J. Pearson*, Q.C., and Mr. *Everitt*, for the old shareholders, were not called upon.

Sir R. Malins, V.C.:—

The question, as I understand, arises thus: This is a company which in January, 1872, had proved wholly unsuccessful, and without additional capital must have been a complete failure. It was therefore arranged that new capital should, if possible, be obtained. Certain persons agreed to take additional shares, which were to be called new shares, and they stipulated for certain advantages, to none of which is it necessary for me to advert except those which are provided for in the fourth resolution. [His Honour read the resolution.] Now, under those circumstances, considering that the new capital was to resuscitate the company and give it its only chance of success, it would have been very reasonable, I think, that it should be provided, not only that they should have certain advantages in the matter of dividend, but that in the winding-up of the company they should be paid in full before the old shareholders got anything. But they have not done so, and in order to give such a right, I must find a contract for

it. I do not find a word of the kind. That which one would think might reasonably have been done was not done. Probably they ought to have had given to them that advantage. I have seen such cases before me where, not only was it said that they were to have certain advantages during the continuance of the company, but in the event of the company being wound up their capital should be repaid before the old capital. There is not a word approaching that, so far as I can see; and as to Mr. *Haymen's* debt, I cannot enter into that question. I cannot go into the question of how the deficiency arose. Certain it is that they had the privilege of not being called upon except for particular purposes, and beyond that I do not find that they contracted for anything. I am therefore of opinion that the debts having been paid, the sum in question, whatever remains after the debts and liabilities have been paid, shall be divided rateably amongst all the shareholders.

Mr. *J. Pearson*, Q.C., and Mr. *Everitt*, for the old shareholders:—

A further question now arises, how this surplus of £3500 is to be divided. The old shareholders have paid up the whole amount due upon their shares, but the new shareholders have only paid 16*s.* per share upon their shares; consequently the new shareholders must contribute as much as the old shareholders before they can have the advantage to be derived from the distribution of the surplus. Those who have paid 20*s.* must be put on a level with those who have only paid 16*s.*, therefore 4*s.* must be paid back, in the first instance, to the old shareholders before the remainder is distributed. This was decided in *Ex parte Maude* (1). In that case there had been an issue of shares of £25 each, and some of the shareholders had paid up the whole £25, but some had only paid £20, and the dividends had been received by them in proportion to the amount so paid by each. The Lords Justices held, that in the distribution of the surplus assets of the company, the holders of fully paid-up shares were entitled to receive £5 per share before the assets were divided. There was a similar decision in *In re Anglesea Colliery Company* (2) by the Master of the Rolls. In that case a call had been made by the liquidators in a volun-

(1) Law Rep. 6 Ch. 51. (2) Law Rep. 2 Eq. 379. 12 Jan 1874

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tary winding-up upon the shareholders who had partly paid up, in order to adjust the rights of the contributories amongst themselves, with a view to equalize the payments of the ordinary shareholders with the nominal advances of shareholders who had taken fully paid-up shares in exchange for property sold to the company, and it was held that the call was rightly made.

Here the new shareholders are given certain privileges, but beyond the fourth resolution, and apart from that, they have no privilege, because the sixth resolution says that, "except as aforesaid, the new shares and the capital represented thereby shall, for all purposes, be deemed ordinary shares and part of the ordinary capital of the company." The new shareholders must, therefore, be treated in all respects as ordinary shareholders, and can have no privileges beyond what they have contracted for.

Mr. *Cotton*, Q.C., and Mr. *Harvey* were not called upon.

Sir R. Malins, V.C.:—

I think I need not trouble you further, Mr. *Cotton*. This is a different case from *Ex parte Maude* (1), in my opinion. There was no additional call of capital there, but that was a case in which the shareholders had a right to anticipate their calls. Some had done so and some had not; but Mr. *Maude*, as I understand, had anticipated his calls, and it was urged before me—and I thought there was great force in the argument—that inasmuch as he had paid up his call he was entitled to a greater amount of profit, if profit had been made, and so, having had a greater amount of profit, he could only share with the others according to what he had paid when the division of profits took place. The Lords Justices, however, thought differently. But this is a case in which the company being, as I have already pointed out, in great distress, with no possible chance of success except with the addition of fresh capital, fresh capital is provided by these new shareholders. Therefore, in the winding-up, my opinion is that the capital ought to be divided amongst the old shareholders and the new shareholders, in proportion to the amounts which they have respectively advanced. It would be the height of injustice to hold that out of the money

(1) Law Rep. 6 Ch. 51.

provided by the new shareholders the old shareholders are actually to get 5*s.* of their money back. Therefore, this being a totally distinct case from anything which has occurred before, and the other cases having no application to it, the division will be as I have already stated. The costs of all parties will come out of the estate.

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Solicitor for all parties: Mr. *J. W. Sykes.*

KELSEY *v.* KELSEY.

V.-C. M. 1874 *Feb.* 10.

[1872 K. 62.]

Annuity charged on Land—Arrears—Bill for Sale—Power of Distress.

A testator bequeathed certain leasehold property to his nephew, upon condition that he should pay out of the rents and profits thereof an annuity of £70. The annuity was paid for sixteen years, but for the half-yearly sum of £35, due on the 15th of August, 1872, the nephew gave a cheque which was dishonoured, and the annuitant filed a bill on the 25th of November, 1872, for the sale of the property and for a receiver:—

Held, that as the estate was amply sufficient to answer the annuity, the Plaintiff might have recovered the arrears by distress, or might have brought an action upon the dishonoured cheque; and bill dismissed.

7 Ch D. 58

Richard Kelsey made his will on the 23rd of January, 1854, and thereby, amongst other things, bequeathed as follows:—

"And I bequeath the two leasehold plots of ground, and the buildings which have been erected thereon, unto my nephew *John Kelsey* the younger, upon condition that he do pay thereout, or out of the rents and profits thereof, an annuity or sum of £70 per annum, by half-yearly payments, unto my brother *James Kelsey* and to his present wife during their joint lives, and to the survivor of them during his or her life. And also that he do pay thereout another annuity or sum of £70 per annum, by half-yearly payments, unto my brother *William Thomas Kelsey* and to his present wife during their lives, and to the survivor of them during his or her life, the said payments to be made as near as may be on the 15th of February and the 15th of August in each respective year."

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The testator died on the 7th of August, 1856, possessed of large property.

James Kelsey, the first annuitant, and his wife were both dead, and the wife of *W. T. Kelsey* was also dead.

For some time past the Plaintiff, *W. T. Kelsey*, had experienced considerable difficulty in obtaining payment of his annuity of £70, and the proportion of the annuity payable on the 15th of August, 1872, had not been paid; but, after several applications were made, *J. Kelsey* gave the Plaintiff a cheque dated the 16th of October, 1872, for the amount, which was returned dishonoured by the bankers, and the said annuity, with the exception of £5, remained due on the 25th of November, when the bill was filed.

The bill prayed that an account might be taken of what was due for arrears of the annuity, and that the Defendant, *John Kelsey*, might be ordered to pay the same, and also to pay the growing payments as they should become due, and that if he did not pay what was due the leasehold plots of ground and buildings might be sold to raise the same; and that a receiver of such leasehold plots of ground and buildings bequeathed to the Defendant, and of the rents and profits, might be appointed.

After the filing of the bill further correspondence took place between the parties up to the 21st of December, 1872, but no satisfactory arrangement having been come to, and no distinct promise to pay having been given by the Defendant, the suit was proceeded with. The amount due was afterwards paid, as well as the subsequent half-yearly payments, and nothing remained due when the cause came on for hearing.

Mr. *Glasse*, Q.C., and Mr. *Crossley*, for the Plaintiff:—

This case is very similar to the case of *Sollory* v. *Leaver* (1), decided by your Honour in November, 1869; but we venture to think that if all the cases upon the subject had then been cited, you would have come to a different conclusion.

The authorities upon which we now contend that this bill is one that ought to be sustained, commence as long ago as the year 1700. The first is *Foster* v. *Foster* (2), where an annuity was given issuing out of an estate devised in fee to the Defendant, with power

(1) Law Rep. 9 Eq. 22. (2) Prec. Ch. 122; 2 Vern. 386.

of distress. A bill was filed by the widow and executrix of the annuitant for satisfaction of the arrears, and the Master of the Rolls decreed the arrears with costs and charges, the Plaintiff to enter and enjoy the property until satisfied. From that time downwards, through a series of cases, the same principle has been maintained. In *Manly* v. *Hawkins* (1) it was held that the Court of Chancery had a concurrent jurisdiction with Courts of Law in annuity cases, and therefore could entertain a suit to raise the arrears of an annuity, though the deed granting the annuity contained a clause enabling the grantee to distrain, and the bill contained no averment of any substantial difficulty to prevent the Plaintiff availing himself of that remedy. A similar decision was arrived at in *Cupit* v. *Jackson* (2), where it was held that a bill filed by an executrix for payment of nine years' arrears of an annuity, charged by deed upon real estate due to her testator, the grantee, to be raised by sale or mortgage, was well brought, and relief was decreed accordingly, although by the provisions of the deed the Plaintiff might have distrained, or might have had an action of debt or distress under the statute 32 Hen. 8, c. 37. These cases have been followed by *Bensley* v. *Burdon* (3) and *Williams* v. *Bown* (4).

Mr. *J. Pearson*, Q.C., and Mr. *J. Wilkinson*, for the Defendant:—

In this case the annuity was regularly paid for sixteen years. It then fell in arrear for three months, and the annuitant, who is the uncle of the Defendant, filed this bill against his nephew. There could be no justification for such a step being taken. It is true that the nephew gave to the Plaintiff a cheque, not having at the moment sufficient assets at his bankers to pay the amount; but this might happen to any one, and the amount was subsequently paid, and the annuity has since been regularly kept down. Under any circumstances the bill was useless, since the Plaintiff might have brought an action against the Defendant upon the dishonoured cheque, and might have recovered judgment immediately. The only question, therefore, is one of costs, and that depends upon

(1) 1 Dr. & Wal. 363.
(2) M'Leland, 495; 13 Price, 721.
(3) 2 S. & S. 519.
(4) 1 Coop. C. P. 360.

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whether the Plaintiff was legally right in filing this bill. The case of *Sollory* v. *Leaver* (1) was decided by your Honour in 1869, consequently this bill must have been drawn with the knowledge of that decision having been made, and that alone should disentitle the Plaintiff to costs.

But upon principle it will not be difficult to shew that this bill cannot be sustained, and that *Sollory* v. *Leaver* was rightly decided. There is no authority in the books contrary to the doctrine laid down by your Honour. In the case of *Foster* v. *Foster* (2) the rents were in arrear, and there were no sufficient rents to keep down the annuity, and moreover the decision seems to have been questioned, for the reporter has appended a note to the effect that the Lord Keeper had that term dismissed the bill in a like case in *Champernoon* v. *Gubbs*. That case is reported (3); and there the Plaintiff had £120 per annum rent-charge settled upon her by way of jointure, and there being a great arrear, and not sufficient distress on the land, the Plaintiff filed her bill that the Defendant, the devisee of the inheritance, might set out sufficient distress, or that the Plaintiff might hold and enjoy till paid the arrears; and the Court held that when one remedy was provided, viz., by distress, it would not give her another unless fraud be proved. In *Foster* v. *Foster* the arrears could not have been obtained by distress. *Cupit* v. *Jackson* (4) and *Manly* v. *Hawkins* (5) proceed upon the same principle, and do not clash with your Honour's decision in *Sollory* v. *Leaver*. Here there was only one half-yearly payment due when the bill was filed—in fact there was only £30 due—and there were ample rents to pay the annuity; consequently a distress would have entirely met the case; and the Plaintiff, having the remedy by distress, cannot be entitled to another remedy unless fraud be proved, which is not the case here. The case of *Buxton* v. *Monkhouse* (6) is a clear decision by Lord *Eldon* that where there is sufficient remedy by distress at law this Court will not grant a receiver. There was a similar decision in *Buttery* v. *Robinson* (7). Here the remedy by distress was sufficient for the Plaintiff, or

(1) Law Rep. 9 Eq. 22.
(2) Prec. Ch. 122; 2 Vern. 386.
(3) 2 Vern. 382.
(4) M'Leland, 495; 13 Price, 721.
(5) 1 Dr. & Wal. 363.
(6) Coop. G. 41.
(7) 3 Bing. 392.

he might have brought his action on the dishonoured cheque. In any case the bill was useless, and ought to be dismissed with costs.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

It appears that the testator, *R. Kelsey*, died possessed of considerable property, far exceeding the amount of the annuities. It was therefore the duty of the Defendant to keep the annuities regularly paid. This he did down to 1872, though it is stated that some difficulty was experienced in obtaining the money. From some cause or other the payments in 1872 became irregular; and the Plaintiff, on the 25th of November, 1872, files this bill against his nephew to obtain payment of the half-yearly sum then due, less £5 paid on account, amounting therefore to £30. The payment became due on the 15th of August, consequently the bill was filed three months afterwards. It is shewn that the Defendant, when applied to for the money, gave the Plaintiff a cheque, which was dishonoured, and this was the cause of the bill having been filed. The testator died in August, 1856, therefore the annuities must have been paid for sixteen years; and it appears that since the bill was filed the half-yearly payments have been kept down regularly. The case has been contested with the utmost vigour, but inasmuch as the suit is now quite useless, the result is that the only important question remaining is upon whom the expense of the litigation is to fall. Was there, then, any justification for filing the bill? It would be a deplorable thing if upon every trivial event in life such litigation as this could be justified. There was here only one half-yearly payment in arrear, and yet three months after it became due the Plaintiff filed a bill against his nephew to enforce payment. But the Plaintiff had in his possession the dishonoured cheque, upon which he might have sued the Defendant either in one of the superior Courts of Law or in the County Court; and as there could be no defence to an action upon a dishonoured cheque, he might have obtained judgment within ten days. Was he justified, then, in entering upon the expenses of a Chancery suit?

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This case is in all respects like that of *Sollory* v. *Leaver* (1), which I decided in November, 1869. There the testator gave an annuity which he directed to be paid by his son, and, subject to and charged with the payment of his debts and legacies and the annuity thereinbefore mentioned, he devised and bequeathed his real and personal property to his son absolutely. The annuity fell in arrear after having been regularly paid for twenty years—here it has been paid for sixteen years—and the annuitant filed his bill to enforce payment, and moved for a receiver. There was in that case a power of distress superadded by the statute 4 Geo. 2, c. 28, and the Plaintiff might consequently have helped himself to recover the amount due, and I refused to appoint a receiver, and the bill was subsequently dismissed. It is now said by the Plaintiff's counsel that I should have come to a different conclusion if various cases (one of them decided one hundred and seventy years ago, and which has now been cited to me) had then been brought to my notice. I am bound to say I have no doubt that I came to a perfectly correct conclusion in *Sollory* v. *Leaver*, though I do not think that in every case it would be right to refuse a receiver; because, for instance, there might be an annuity charged on property the rents of which would not be sufficient to pay the amount due, then I should have thought that a receiver might be necessary. Or where an annuity has been long in arrear, and a distress would not enable the annuitant to raise the amount due—in that case a receiver might be necessary. The three cases cited—*Foster* v. *Foster* (2), *Manly* v. *Hawkins* (3), and *Cupit* v. *Jackson* (4)—and many others of a similar nature, go on that principle. But if it is said that I decided *Sollory* v. *Leaver* without having my attention drawn to these cases, I answer that the decision was not made in the absence of authority, for I proceeded upon the decision of Lord *Eldon* in the case of *Buxton* v. *Monkhouse* (5). In that case there was a power to distrain given by deed. A receiver was in the first instance appointed, but Lord *Eldon*, upon a motion to discharge the receiver, held that the appointment had been improperly made, the Plaintiff having been a trustee with power of entry and distress

(1) Law Rep. 9 Eq. 22.
(2) Prec. Ch. 122; 2 Vern. 386.
(3) 1 Dr. & Wal. 363.
(4) M'Leland, 495; 13 Price, 721.
(5) Coop. G. 41.

on the estates. There Lord *Eldon* gave the very reason upon which I decided *Sollory* v. *Leaver* (1), that the trustee had power to distrain. In *Sollory* v. *Leaver* the annuitant had a power of distress, and I thought the case was analogous, the principle being that the Court will not help those who have power to help themselves, and I refused to appoint a receiver. In this case one half-year's annuity was due, and upon application being made for payment the Defendant gave a cheque, which was dishonoured, but upon which the Plaintiff might at once have brought an action and recovered the amount. Under any circumstances, he should have waited until the next half-yearly payment became due; and there was no justification whatever for his filing this bill. Under these circumstances, I think the bill ought to be dismissed with costs; but, then, upon the question of costs there is this to be said, that when the Defendant was required to pay the amount for which he had given his cheque, he should have made a distinct promise to pay, instead of which he allowed the suit to proceed; therefore I shall not give him any costs after the time when that promise might have been given, which was on the 21st of December, 1872.

The decree will therefore be to dismiss the bill with costs, but, upon taxation, no costs to be allowed to the Defendant after the 21st of December, 1872.

Solicitor for the Plaintiff: Mr. *F. W. Pamphilon.*

Solicitors for the Defendant: Messrs. *Stevens, Wilkinson, & Harries.*

(1) Law Rep. 9 Eq. 22.

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JAMES *v.* THE QUEEN.

[1874 J. 14.]

Petition of Right—Free Miners—Right to "Gales"—Application for Grant—Death before Registration—Transmissible Interest.

J. D., a free miner of the *Forest of Dean*, applied for a vacant gale, and his application was duly entered in the books of the gaveller, who thereupon gave notice that a grant of the gale would be made on a particular day.

Other applicants appeared whose claims were disallowed, but the grant of the gale was delayed until the free miner died, when his devisees presented a petition of right claiming to be entitled to a grant of the gale in right of *J. D.*

Demurrer on the ground that *J. D.* had not acquired a title to the gale, transmissible by will, overruled with costs against the Crown.

DEMURRER to Petition of Right.

The Petition stated that *James Davis*, deceased, was a duly registered free miner of the hundred of *St. Briavels* within the meaning and according to the provisions of the Act 1 & 2 Vict. c. 43, intituled "An Act for regulating the opening and working of mines and quarries in the *Forest of Dean* and hundred of *St. Briavels*, in the county of *Gloucester*," and as such, entitled to obtain grants of gales within the said forest and hundred, in accordance with the said Act:

That, on the 4th of November, 1868, and afterwards on the 5th of July, 1872, *James Davis* signed an application for a gale within the forest, and lodged the same at the office of the deputy-gaveller of the forest, at *Coleford*. A similar application for the same gale was also lodged with the deputy-gaveller by *William Ellway*, and the deputy-gaveller, having entered these applications in a book kept by him for that purpose, subsequently caused an advertisement to be inserted in a newspaper, called *The Forester*, on the 12th and 19th of July, 1872, giving notice that the applications by *J. Davis* and *W. Ellway* to have a gale granted to them had been received, and that the gale so applied for was intended to be granted on the 2nd of August, 1872. Accordingly, on that day *J. Davis* and his solicitor attended at the office of the deputy-

gaveller and protested against any effect being given to the application by *W. Ellway;* and in consequence of the illness of the said *W. Ellway* the proceedings were adjourned to the 9th of August.

A subsequent protest was made against the allotment of the said gale to *J. Davis* by two other free miners, named *Stephen Adams* and *Henry Jordan,* who alleged that they were entitled to an allotment thereof.

Under these circumstances a bill was filed by *J. Davis,* to restrain the gaveller and deputy-gaveller of the forest from granting the said gale to *W. Ellway, S. Adams, H. Jordan,* or any person other than *J. Davis,* and that the claim of *J. Davis* might be declared to be a valid and subsisting claim, and that he was entitled to have a grant of such gale.

When the suit came on to be heard in November, 1872, a demurrer was allowed on the ground that the gaveller and deputy-gaveller were not the right parties to be sued, as the matter affected the soil and freehold of Her Majesty, and the Court had therefore no jurisdiction to decide the question.

To this bill *W. Ellway* put in a disclaimer, and *S. Adams* and *H. Jordan* filed a joint and several answer thereto.

An application was then made to the office of Her Majesty's Woods and Forests by *J. Davis,* that the grant of the gale should be at once proceeded with; and in pursuance of instructions from the solicitors to Her Majesty's Woods and Forests, the deputy-gaveller caused an advertisement to be inserted in *The Forester* newspaper on the 28th of February, 1873, to the same effect as the previous notice, except that the name of *W. Ellway* was omitted therefrom, and the 14th of March, 1873, was therein named as the day upon which such gale would be granted.

On the 11th of March a protest was served upon the deputy-gaveller by *S. Adams* and *H. Jordan* against the grant of the gale being made to *J. Davis,* and alleging that they were entitled to such grant. In answer to this protest the gaveller decided upon postponing for one month the proposed grant to *J. Davis,* in order to give Messrs. *Adams* and *Jordan* an opportunity of applying for an injunction to prevent *J. Davis* from accepting the grant of the gale, but he informed them that if an injunction was not obtained

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within one month from the 13th of March, 1873, the grant would be made to *J. Davis* without further delay.

No steps were taken within the month by Messrs. *Adams* and *Jordan* to obtain the injunction, but the deputy-gaveller still refused to make the grant, in consequence of a notice on the part of *Adams* and *Jordan* that they were about to present a petition of right to have their claim allowed.

On the 9th of April, 1873, *John Ellway*, the son of the said *William Ellway*, being also a free miner, filed his bill against *J. Davis*, alleging that *J. Davis* was not entitled to have the gale in question allotted to him, on the ground that he had already had three gales granted to him. That suit came on to be heard before Vice-Chancellor *Malins* on the 23rd of June, 1873 (1), when His Honour decided that *J. Davis* was at liberty to apply to have another gale granted to him, on the ground that he was not then the holder of three gales.

On the 26th of June, 1873, the said *S. Adams* and *H. Jordan* at length filed their petition of right, stating, in effect, that their application for a gale was prior to that of *J. Davis*, and in consequence thereof the gaveller still refused to grant the said gale to *James Davis*, and the said *J. Davis* died on the 19th of November, 1873, at the age of eighty-three years, having by his will given to the suppliants, *A. James* and *Thomas Morse*, the whole of his real and personal estate upon certain trusts therein mentioned. Under these circumstances the present petition of right was filed, praying that, by virtue of the application of *James Davis*, dated the 4th of November, 1868, the said *J. Davis* was entitled to have the gale specified in an advertisement dated the 28th of February, 1873, granted to him in priority to and to the exclusion of all other free miners of the said hundred, and that such gale ought accordingly to have been granted to him on the 14th of March, 1873; and that it might be declared that, under the circumstances aforesaid, the said gale ought now to be granted to the suppliants in right of the said *J. Davis*, deceased, upon the trusts of his will; and that the same might accordingly be granted by the gaveller or deputy-gaveller to the suppliants as such trustees as aforesaid.

To this bill a demurrer was put in by the Attorney-General, on

(1) Law Rep. 16 Eq. 294.

the ground that it was not alleged by the Petition that the suppliants were free miners; that the application made by *J. Davis* for the therein-mentioned gale had not conferred on the suppliants a title to any gale, and that the suppliants had not made any case entitling them to relief.

Mr. *Glasse*, Q.C., and Mr. *W. W. Karslake*, for the demurrer, on behalf of the Crown:—

This is a petition of right by a subject against the Crown, and all the Crown has to do is to see that justice is administered between the different parties claiming to be entitled. There is no interest of the Crown affected, and the Crown can have no feeling in the matter on one side or the other. The Crown has a public duty to perform on behalf of all the free miners, and if the Act of Parliament does not prohibit the grant, and the suppliants are held to be entitled, the Crown will have no hesitation in at once carrying out the law in favour of those persons who, as a matter of feeling, might be supposed to have a just claim.

There is no question in the case as to the testator *James Davis* having been a free miner of the *Forest of Dean*, and, as such, entitled to make application for any vacant gale; but the question is, whether the suppliants, who are his representatives, have a right to claim what was never in fact granted to their testator. It is true that *James Davis* made an application to the gaveller for a grant of this gale, and the gaveller gave notice that on a certain day the grant would be made in case he should be found entitled to it, but other claims have been raised which may or may not be well-founded, and until those claims are disposed of, it cannot be said that *Davis* was entitled to a grant. The claims are still pending which were raised on behalf of Messrs. *Adams* and *Jordan* before the death of *Davis*, and consequently the grant was not made to him. The Act of Parliament, 1 & 2 Vict. c. 43, which was passed for the purpose of settling all the disputes previously existing as to the rights of free miners, enacts in the 60th section that the gaveller or deputy-gaveller shall enter in his book all applications for gales, and when there shall be more applications than one the parties shall draw lots to ascertain who is to be entitled; and the 62nd section provides that the gaveller shall

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not be compellable to grant any gale under the circumstances therein mentioned, shewing that it is for the gaveller to decide who is entitled, and it is not a matter of right that the first applicant is to have the gale he applies for. But the 38th section concludes the case when it provides that no persons shall be considered as entitled to any gale unless such gale shall have been duly granted by the gaveller, and entered in the gaveller's books, and that an application made by any person for a gale, but which has not been duly granted by and entered in the books of the gaveller, shall not confer a title to any gale. We say, therefore, that *J. Davis* was not entitled to this gale before his death, and we further contend that if he had a right, that right would not descend to his representatives. The 23rd section provides that such free miner, duly registered as aforesaid, should have the exclusive right of having a gale granted to him, and it should be lawful for him to sell, transfer, assign, or dispose of such gale either by deed or will to each other, or to any other person or persons whosoever. Now *J. Davis* never received a grant of the gale, and was never registered as owner of the gale. It was not, therefore, a transmissible interest, and the suppliants, who are not free miners themselves, are not entitled to receive the grant or to be registered in respect of a gale which was never granted to their testator.

Mr. *Higgins*, Q.C., and Mr. *J. G. Wood*, in support of the Petition:—

The main question is, whether *James Davis*, when he made his application in the form pointed out by the statute, did not acquire a transmissible interest in the gale he applied for—whether in fact the application itself did not give him an equitable right in the property. Then, in the next place, we contend that what was done by the gaveller subsequently to the application confirmed *James Davis* in his right.

The rights of the free miners existed long before the Act of Parliament 1 & 2 Vict. c. 43. The Act was only passed to regulate and confirm those rights, and to apply certain forms and regulations to control the various conflicting interests which had grown up from time to time among the free miners of the *Forest of Dean*. *James Davis*, whose title to be a free miner is not disputed,

was one of the persons whose claims had existed for many years anterior to the passing of the Act, and when he made his claim to this gale on the 4th of November, 1868, he was exercising a right already vested in him. This application was lodged with the deputy-gaveller, and a similar application for the same gale was also lodged by *William Ellway;* and the deputy-gaveller gave notice by advertisement that these two applications had been made, and that he should grant the gale in pursuance thereof on a particular day. That proceeding was adjourned in consequence of the illness of *Ellway*, but the claim of *Ellway* was withdrawn. Then other claims sprang up, but the deputy-gaveller issued a second notice on the 28th of February, 1873, to the same effect as the first advertisement, and another day was fixed for granting the gale. Further protests were again made against the confirmation of the grant to *Davis*, and a new claimant to the gale appeared in *John Ellway*, the son of *William Ellway*, but his claim was disposed of by your Honour's decision in the case of *Ellway* v. *Davis* (1). By these means the rights of *J. Davis* were again delayed until his death in November, 1873. No one can deny that this is a great hardship upon *J. Davis*, whose rights have been frustrated by persons having no just claim to the property. What we contend is, that the gaveller is bound by the Act to grant the gale to free miners in the order of their applications, and that the entry of such application in the books of the gaveller is evidence of the claimant's title. That is shewn by the 60th section of the Act, but is made more certain by the 62nd section, which provides that the gaveller shall not be compellable to grant any gale which may interfere with any existing gale. In this case it is not alleged that the gale in question would interfere with any other gale, and the fact of the notice by the gaveller that he would grant the gale on a particular day is evidence of there being no objection under the 62nd section, consequently he is compellable to complete the grant. Then it is said that the 38th section precludes the right of *Davis*, because although his claim was recognised, yet no grant to him of the gale has been made and duly registered in the books of the gaveller, and that unless the grant and registration are complete, no title is conferred to the gale; but this section

(1) Law Rep. 16 Eq. 294.

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evidently applies to the state of things existing at the time of the passing of the Act. The section, as read by the light of the following section, must mean that no person shall be considered as entitled to a gale at the time of the passing of the Act, by virtue of an application made since the 9th of April, 1832, unless the Commissioners should otherwise decide. It cannot be made to apply to future applications, that is, applications made after the passing of the Act, without introducing other words into the section; and this is shewn by all the sections governing the 38th, from the preamble all through the Act. The grant of these gales is not a matter of favour from the Crown. The Crown has no right to favour one applicant more than another. It is a matter of right in the free miner which was vested in him before the statute was passed, and has now become a statutory right. If this claim is not sustained, it may be in the power of any other person alleging himself to be a free miner, or any number of persons, to set up claims and make protests, and thus to postpone the legal right of the first applicant until he is deprived of those rights by death. The gaveller has no discretion in the exercise of his duties, and the first free miner who applies for a vacant gale, and whose application is duly entered, is entitled by right to the grant, and the registration of the grant merely recognises and confirms that right. Then, as to whether this right is transmissible to the claimant's representatives, on this question the 23rd section of the Act is conclusive that it shall be lawful for every free miner who is entitled to a gale, to sell, transfer, assign, or dispose of such gale and all other the gales to which they are entitled, either by deed or will, to each other, or to any other person or persons whomsoever. If, therefore, *J. Davis* was entitled to the gale, he had a right to dispose of it by will, and the present suppliants have a right to call upon the gaveller to confirm them in the title to such gale.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

This is a petition of right addressed to the Queen by *Allen James* and *Thomas Morse*, who are the legal personal representa-

tives of one *James Davis*, who died on the 19th of November, 1873.

It raises an important question with regard to the right of the free miners in the district of the *Forest of Dean*, in which district it is known that for very many years, for generations past indeed, those who are free miners have had very valuable rights of obtaining a grant of a gale, which means a right to work a particular district and sink for iron or coal, or both, these two minerals being found in this district in great abundance.

In the year 1838, in consequence of the number of free miners and the manner in which their rights had been dealt with, matters for some time had fallen into great confusion; and, in order to abolish that confusion, the Act of Parliament which gives rise to this question was passed in July, 1838. Amongst other things, that Act of Parliament defines who are the free miners; but there is no question upon that subject, here. It is admitted that *James Davis* was a free miner, and had no doubt been so for very many years, as he died at the age of eighty-three. Probably he was a free miner for more than sixty years, for all that is required of a free miner is that he shall be twenty-one years of age, and shall have resided in a particular parish for one year and a day.

Then, being a free miner, he has the rights which he had in point of fact before the passing of this Act, which are confirmed to him by the Act; and amongst the rights is that of applying for a gale, and, as I read the Act of Parliament, the gaveller or deputy-gaveller (the gaveller is the person who exercises the function, and the deputy acts for him) has no discretion whatever, but upon an application being made by a free miner for a gale which is free from any other application, the first applicant is to have the gale. What the gaveller has to do is to consider—Is the applicant a free miner? Does he apply for a gale which is unoccupied? And if he finds that he is a free miner, and that he applies for that which is unoccupied, then his duty is prescribed by the 60th section of this Act, which is in these terms: "That the gaveller or deputy-gaveller for the time being shall grant gales to free miners in the order of their applications in writing to be made from and after the passing of this Act, and the entry of such applications in the books of the gaveller or deputy-gaveller

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shall be evidence of the priority of such applications respectively; and the said gaveller or deputy-gaveller is hereby directed to make entries of all such applications as aforesaid, and in the order in which the same are made; and the application for such gales shall be made by the filling up of a printed form of application to be provided by the said gaveller or deputy-gaveller; and when there shall be more than one application on the same day for the same gale, then the person who is to be entitled thereto shall be determined on by lot to be drawn by the parties before the gaveller or deputy-gaveller, and as he shall direct, and for the purposes of this Act the day shall be taken to begin at 10 of the clock in the morning and end at 5 of the clock in the afternoon." Therefore when they are not on the same day the priority is settled by the day on which the application is made.

Then the 62nd section provides: "And be it enacted that the said gaveller or deputy-gaveller for the time being shall not be compellable to grant any gale which he may conceive will interfere with any existing gale, pit, level, or work, or which, either from its proposed situation or extent, shall not, in the opinion of the said gaveller or deputy-gaveller, be considered as adapted for obtaining the coal or other mineral in the best and most economical manner." Mr. *Higgins* says—and I think there is considerable force in the argument—that this section, when it says that the gaveller "shall not be compellable," implies that in other cases he is compellable.

Now *Davis*, having every qualification to apply for a gale, makes an application. How is that dealt with by the gaveller? He made the first application so long ago as 1868, but I do not think I need go into that, because the more formal one, and the most important in this case, is that which was made on the 5th of July, 1872. That application was acceded to by the gaveller, who entered it in his book, and gave notice of it in a public paper, which is accessible, and indeed, I suppose, published in that district for the information of this very class of persons, the free miners; and it is in these terms: "*Forest of Dean* and Hundred of *St. Briavels*, county of *Gloucester*, Act 1st and 2nd Victoria, cap. 43. Notice is hereby given, that Her Majesty's gaveller of and for the *Forest of Dean* has received an application from *James Davis*, of

Yorkley, and *Wm. Ellway*, of *Yorkley*" (the claim of *Ellway* was afterwards disposed of), "to have a gale granted to them of a certain work or intended work, or iron mine, situate or intended to be situate at or near *Yorkley*, fifty yards south-east of the *Nag's Head Inn*, within the *Forest of Dean* and Hundred of *St. Briavels*, in the county of *Gloucester*. That the gale so applied for is intended to be worked by means of a pit or level, and that the deep limestone is the vein of iron ore proposed to be got by means thereof; and that the said *James Davis* and *Wm. Ellway*, being free miners duly registered for the purposes of the Act of Parliament, 1st and 2nd Victoria, cap. 43, are entitled to have a gale granted to them, under the authority of the said Act, of coal and iron mines within the said forest and hundred."

Therefore here the gaveller accedes to every part of the application—admits his title, admits the application, and gives this notice:—"Notice is hereby given that the gale so applied for as above-mentioned is intended to be granted on the 2nd day of August, 1872, at noon, in a certain building or place of business usually called or known as the Gaveller's Office, situate in the town of *Coleford*, in the hundred of *St. Briavels*, in the county of *Gloucester* aforesaid; and the said gale so applied for and intended to be granted is bounded," and so forth. Then he describes the boundaries.

Now, therefore, the deputy-gaveller, having no discretion whatever to exercise, but being bound to grant the gale if it is free from any other application, has here in the most formal manner acceded to this application, and gives notice that he will proceed to perfect it by an actual grant on the 2nd of August, 1872. After that date other claimants come forward, namely, *Adams* and *Jordan*, who had made application so long ago as 1846 for this gale, or some part of it. The gaveller, in the exercise of his duties, gave notice that that application could not be acceded to, because there had been a grant which had entirely displaced them; but as they persisted in their claim, and in consequence of that claim, instead of the grant being perfected, as the notice said it would be, on the 2nd of August, 1872, it is postponed again, and on the 13th of March, 1873, the gaveller, Mr. *Howard*, writes this letter in reply to a notice from *Adams* and *Jordan*, who had given him notice not

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to perfect the grant to *Davis*:—"Gentlemen,—I have to acknowledge the receipt of your notice, dated the 11th instant, objecting to, opposing, and protesting against the grant of a gale being made to *James Davis*, of *Yorkley*, of which intended grant notice has been advertised. In reply, I have to inform you that the proposed grant to *James Davis* will be postponed for one month from this date" (that is, to the 13th of April, 1873), "in order to give you an opportunity of applying for an injunction to prevent *Davis* applying for or accepting a grant of the gale. You will be good enough to bear in mind that I must not be made a party to the suit, as I am not liable to be sued, and that, if an injunction is not obtained within one month from this date, the grant will be made to *James Davis* without further delay." Nothing, in my opinion, could be more proper than the course adopted on that occasion by the gaveller.

But, however, other difficulties interposed; other claims were made, bills were filed, and every obstacle thrown in the way of *Davis* getting a grant; and so matters went on until the 19th of November last year, when *James Davis*, the applicant, the free miner, and who, according to Mr. *Higgins's* argument, became absolutely entitled to this gale, died.

Now it is contended that upon this all rights upon his part ceased. It is said that the grant must be to a free miner—it cannot be to a representative—and that he can have no right to transmit it unless the grant is made in his lifetime. That question depends solely upon the 38th section of the Act, to which I will refer; but before I do so I must look at the principle. This is no new principle in this Court. The right of the miner is to have a gale; all that is incumbent upon the gaveller or the deputy-gaveller is to fix upon the boundaries. If the ground is unoccupied, it is the free miner's, as I conceive, the moment he gives notice to take it. It is very much, I think, like the right of a railway company who have compulsory powers of taking land and serving notice to treat. Upon that notice to treat being served, as between them and the landowner, the land becomes the property of the company. It is like the case of a right of pre-emption. *A.* says to *B.*, "You may have my estate at a given price if you will give me notice in a limited time." The purchaser gives notice, and the land the

moment the notice is served becomes his. So in this case, upon principle, my opinion is that the moment a free miner gives notice to the deputy-gaveller, who has no discretion to exercise, as I have already said, the gale becomes his; and the 23rd section says that when it becomes his he is at liberty to sell or transfer it. I assume now for this purpose that he comes in upon the notice being given "That such free miners duly registered as aforesaid shall have the exclusive right of having gales or works granted to them by Her Majesty's officer, herein called gaveller, or deputy-gaveller, to open mines within the said hundred, and to have gales or leases of quarries within the said forest, as hereinafter mentioned; and it shall be lawful for such free miners to sell, transfer, assign, or dispose of such gales and works, and all other the gales and works to which they are now entitled, and all quarries to be defined as aftermentioned, either by deed or will, to each other or to any other person or persons whomsoever."

Now, therefore, when application was made by *Davis*, a free miner, and that application was acceded to by the gaveller, as it was, by the notice of the 12th of July that the gale would be granted on the 2nd of August, and that notice was again renewed by the notice to *Adams* and *Jordan*, it seems to me that everything had been done to perfect the title of the free miner, except clothing him with the actual legal estate by delivery out to him of the grant; and it does seem to me, upon every principle, that when that was once done the free miner was then in a situation to deal with it, because we know by experience that these men do not work these gales themselves. They are things of great value probably, and from what I have heard of this particular gale, I have no doubt it was worth many thousand pounds to this poor man, and that he had been long in the expectation that he would become a rich man by this gale, and died so; whereas, on the other hand, if this argument on the part of the Crown was to succeed, by the mere accidental delay and interposition of other persons, who set up a claim which they have not been able to sustain, by that accidental circumstance the family of this man, instead of being probably left in affluence, may, for aught I know, have been left in indigence. I quite agree with Mr. *Glasse's* argument that all those considerations must be set aside—that I am not

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in the slightest degree to indulge in them—if the proper interpretation of the Act of Parliament is that which has been contended for on the part of the Crown.

Such being, upon the general principles of this Court, the right of the parties, and such being, as I collect, independently of the 38th section, the proper construction of this Act of Parliament, I think I ought not, at all events in the present state of this cause, to accede to the argument of the Crown upon the 38th section, unless I am perfectly clear that there is no doubt upon the subject whatever, that it does apply, not only to the state of things which existed at the time that the Act passed, but to all the states of things which should thereafter occur.

With regard to the 38th section, considering the state of confusion which existed when the Act passed, and for the removal of which it was passed, I think that that might not be an unfair interpretation which has been contended for on the part of the suppliants, that this 38th section is not intended to apply to all time, but only to the state of things which existed when the Act of Parliament passed, when the rights were uncertain and had got into great confusion. I will now read the 38th section to see what its language is: "Be it enacted that no person shall be considered as entitled to any gale at the time of the passing of this Act, unless such gale shall have been duly granted by the gaveller and entered on the gaveller's books on or before the 9th day of April, 1832." This date is explained by sect. 39, which says that all granting of gales was suspended after that date until the passing of the Act. There was a commission appointed at that time.

That first part of the section refers to the state of things before the passing of the Act, and one would infer naturally that some part of the section would apply to the period of the passing of the Act. I think that the language favours the view that it applies, not to the state of things which afterwards existed, but to what then existed—I think that to be probable. I do not, however, finally decide it, because the only question now is, whether I allow the demurrer. The section goes on: "And an application made by any person for a gale, but which has not been duly granted by and entered in the books of the gaveller or deputy-gaveller (except as regards such gales, pits, levels, or works as shall be

awarded and confirmed by the said Commissioners hereby appointed under the authority in that behalf hereinafter contained), shall not confer a title to any gale." Therefore I read that first part in this way: that no person shall be considered as entitled to any gale at the time of the passing of this Act unless such gale shall have been duly granted by the gaveller and entered on the gaveller's books on or before the 9th of April, and no application already made by any person for a gale which has not been duly granted by and entered in the books of the gaveller or deputy-gaveller shall confer a title to any such gale. That is my interpretation of the natural meaning of the language, and I am very much inclined to agree with the argument, that that is borne out by the 39th section, because it goes on: "And whereas since the 9th day of April, 1832, the granting of gales in the said forest and hundred has been suspended." Why? No doubt suspended on account of the state of confusion as to the rights of the parties. "But since the 9th day of April, 1832, various applications in writing have been made by free miners of gales at various places in the said forest and hundred, and whereas, although such applications have not been granted, nevertheless the same have, in some instances, been acted upon as if they had been granted, and works have been erected and proceeded in under such applications at considerable expense; now therefore be it enacted that the Commissioners appointed under this Act shall determine by their said award whether any and what gales for which such applications have been made subsequent to the said 9th day of April, 1832, and have been so acted upon, can be granted without injury or detriment to any legally existing gales, pits, levels, or works." Therefore, looking at all the sections together for the present purpose, the inclination of my opinion (and it is quite sufficient to say that) is that this 38th section applies only to the state of things which existed when the Act passed, and that it is not prohibitory, and I am very clearly of opinion that it ought not to be prohibitory for the future; and I cannot suppose that it was ever the intention of the Legislature to inflict so great a hardship upon this poor class of men, who by reason of their applications being acceded to are put in a position of just expectation of being possessed of considerable property, as that a mere accidental delay, such as the illness of the

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gaveller or some other accidental circumstance over which they had no control, such as the man dying before the thing was completed, is to deprive them of that which is likely to be a valuable property. I say deliberately that I cannot come to that conclusion unless I find that the language is so positive and clear as to admit of no doubt. I have very great doubt upon the subject, and I think it is a case in which these people ought to have an opportunity of bringing any evidence to shew that that was not the practice, and, therefore, never could have been the intention of the Act, or in other words, that they should be allowed to amend their case as much as they possibly can; and therefore I think it would be a harsh proceeding in the present state of the case to say that this demurrer shall be allowed finally to decide everything against the Petitioners.

With regard to the conduct of the Crown, the officer of the Crown, the Solicitor of Woods and Forests instructing the Attorney-General, and Mr. *Glasse* and Mr. *Karslake*, the counsel who appear on behalf of the Attorney-General, has only performed a public duty. It is not a matter of any feeling. The feeling would all be in favour of *Davis*, and it is only just to the counsel for the Crown to mention that Mr. *Glasse* did say that they would concur in the observation, that if the Act of Parliament does not prohibit the grant it is one that ought to be made. As a matter of feeling, I am sure the inclination of all parties would be in favour of *Davis* and his family. Therefore I think the proper course would be to overrule this demurrer in order that the question may undergo further investigation.

Mr. *Higgins*:—We ask that the costs may follow the usual course, and that they may be the same as in an ordinary suit. That is provided for by *Sir William Bovill's Act*, which says that the suppliant shall be entitled to costs against the Crown.

Mr. *Glasse*:—The Court has the same power to give costs as it would in any private case. It is only fair to the parties on the other side to say that this is not a case in which we should advise the Crown to appeal, and therefore they had better bring the other parties before the Court, so that they may contest the matter

between themselves. If they can get rid of the other parties, we shall be too glad for the Plaintiff to have the gale.

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The VICE-CHANCELLOR:—Considering the parties, I am of opinion that the costs ought to go with the event, and I shall therefore overrule the demurrer with costs.

Solicitors for the Plaintiffs: Messrs. *Peacock & Goddard.*

Solicitor for the Commissioners of Woods and Forests: Mr. *H. Watson.*

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1874
Feb. 14.

[1871 W. 251.]

Production of Documents—Comparison of Handwriting—Cheques—Signatures alleged to be Forgeries.

In a suit in which the genuineness of the signature of a testator to a certain document was one of the issues to be tried, the Defendant was ordered to produce on affidavit any cheques in his possession signed by the testator between specified dates. The Defendant produced a great number of cheques, stating in his affidavit that they were all the cheques in his possession signed by the testator, but that he had other cheques drawn on the testator's bankers, which he did not produce because they were forgeries:—

Held, that the Plaintiffs were not entitled to any further particulars, or to production of the cheques alleged to be forged.

Quære, whether a document required only for comparison of handwriting is a relevant document which a Defendant is bound to specify or produce.

THIS was an adjourned summons, upon the application of the Plaintiffs, to consider the sufficiency of an affidavit of the Defendant *David Featherby Thornbury* as to the documents in his possession or power relating to the matters in question in this cause, pursuant to an order dated the 5th of December, 1873.

The bill was filed by *William Wilson* and *Mary Ann*, his wife (formerly *Mary Ann Cook*), against the representatives of *David Thornbury*, the testator in the pleadings mentioned, claiming to be entitled to a piece of land and the house built thereon, the money for building which was alleged to have been given to the Plaintiff *Mary Ann Wilson* by the testator; or that she might be

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declared entitled to the sum of £500, which was so alleged to have been given for the purpose of erecting such house.

The Plaintiff *Mary Wilson* was formerly the wife of *W. Cook*, deceased, and she and her husband resided with the testator, the Plaintiff acting as the testator's housekeeper. The case made by the bill was, that the testator had taken over from *W. Cook* a farm occupied by him, and was indebted to *W. Cook*, in respect of the farming stock and other matters connected with the farm, in a sum of about £1400. That £900 of this money had been secured to *W. Cook* by the testator's bond, which had been paid by his representatives since his death, and that the testator had signed the following document, dated the 12th of September, 1864, which accounted for the remaining £500:—

"Memorandum, that I have this day received from Mr. *Hunt* and Mr. *Cook* the sum of £500, the said sum to be paid by me into the bank for the purpose of building or buying a house for the said *W. Cook*. I also agree to pay him £5 per cent. interest on the said sum."

The Defendants gave an entirely different account of the transactions and dealings between the testator and *W. Cook*, alleging that the Plaintiffs' statements were incorrect; and they also averred that the signature to the memorandum of the 12th of September, 1864, was a forgery.

The Plaintiffs desired to inspect cheques and documents signed by the testator, for the purpose of comparing the handwriting, and by an order made in Chambers on the 5th of December, 1873, the Defendants were ordered to file a full and sufficient affidavit, stating whether they, or either of them, had in their possession or power any and what cheques drawn by *David Thornbury*, the testator in the pleadings named, between the years 1861 and 1870 inclusive, and the Defendants were ordered to produce for inspection such documents, except such of the same, if any, as they, or any or either of them, might by affidavit object to produce.

The affidavit of the Defendant *David F. Thornbury*, the son of the testator, was to this effect:—"I have in my possession or power the cheques drawn by *David Thornbury*, the testator, between the years 1861 and 1870 inclusive, of which a list is con-

tained in the schedule hereto. And I further say that I have not now, and never had, in my possession, custody, or power, any cheque or cheques drawn by *D. Thornbury* between the years 1861 and 1870, other than and except the cheques set forth in such schedule. I have in my possession other cheques drawn upon the bankers of the testator, but the signatures to them are forgeries, and therefore I do not produce them." The schedule contained a list of about 130 cheques.

Mr. *Cotton*, Q.C., and Mr. *Gardiner*, for the Plaintiffs:—

We submit that under the order for the production we have a right to see all the cheques purporting to be signed by the testator. The Defendant refuses production of some on the ground that they are forgeries. The bankers must have believed them all to be genuine signatures when they paid the money; but even if they should turn out to be forgeries, it may be of the greatest importance to us, for the purpose of ascertaining the genuineness of the signature to the particular document impeached, that we should see all the signatures purporting to be by the testator. The Defendants do not actually accuse us of committing forgery in respect of these cheques, and we might prove upon the evidence of the alleged forgeries that, at any rate, the crime of forgery does not attach to us. If they say that the order for production of documents does not include the cheques alleged to be forgeries, we ought to have another order to include what we are justly entitled to. We are entitled to every document ever signed by the testator relating to the matters in question in the suit.

This lady having now married a second time, and her husband being a very respectable man, it is of the highest importance that her character should be cleared from the imputation cast upon her by the Defendants, and every document which can in any manner serve to discover the truth ought to be produced.

Mr. *Glasse*, Q.C., and Mr. *Hemming*, for the Defendants:—

The order made upon the Defendants was, that they should state whether they had in their possession any and what cheques drawn by the testator between the years 1861 and 1870 inclusive, and that they should produce such documents, except such as they

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might by affidavit object to produce. In answer to this, we say that we have produced all the cheques signed by the testator between the years 1861 and 1870; but the cheques which have forged signatures attached to them are not cheques signed by the testator, but they are cheques signed by some other person, consequently they do not come within the terms of the order. The question, whether the particular memorandum of the 12th of September, 1864, is a forgery or not, is an issue in the cause, and the Plaintiffs have no right to introduce a number of other issues as to whether other cheques are forgeries. It is an entire error to suppose that a Plaintiff is entitled, for the purpose of comparing handwriting, to have production of every document signed by the person whose handwriting is in dispute, and still less is he entitled to production of documents whose genuineness is disputed. Upon the examination of witnesses orally, under the 15 & 16 Vict. c. 86, the mere circumstance of a document being put into a witness's hands by the party examining him in chief, for the purpose of verifying the handwriting, does not entitle the other side to inspect the document: *Lord* v. *Colvin* (1). By the 27th section of the *Common Law Procedure Act* (17 & 18 Vict. c. 125), it is enacted that comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. If we were at the hearing—and in this case the witnesses will be examined orally—a document not proved to the satisfaction of the Judge to be genuine could not be submitted to the witnesses. It is denied that these cheques are genuine, and the Judge could not try that issue. It stands to reason that for the purpose of proving a signature to be genuine it must be compared with a signature admitted to be genuine, not with a forged or disputed signature. The effect of producing the cheques alleged to be forged would be to raise an issue upon every doubtful signature, and have evidence produced before the hearing to prove whether it is genuine or not. Surely the Defendants are not to be subjected to that. One issue of forgery is enough to try. We have already produced

(1) 5 D. M. & G. 47.

130 cheques admitted to be genuine and certified to be so by an expert. These cheques extend to a time long before and after the date of the document alleged to be forged, and there are ample means of deciding the question. The idea of using a disputed document to prove handwriting is contrary to every principle of evidence. Moreover, this question has been already decided, for when the production of documents was sought by the Plaintiffs, your Honour refused to make an order for production of all the documents asked for, and it was only by something like consent that the order was made in this limited form for production of the cheques between 1861 and 1870. This order we have strictly fulfilled. The other cheques are not documents relevant to the question at issue, in the sense that they are documents proper for production in the suit.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

The case is this: The Plaintiff, *Mary Ann Wilson*, who is now the wife of Mr. *Wilson*, was housekeeper to the testator, *David Thornbury*. She alleges that her master gave her certain property. She says he was indebted to her former husband, Mr. *Cook*, in a sum of £500, and some arrangement was made that she was to have a house built for her instead of receiving the money; and that this arrangement was carried out on the 12th of September, 1864, when the testator signed the following document:—"Memorandum, that I have this day received from Mr. *Hunt* and Mr. *Cook* the sum of £500, the said sum to be paid by me into the bank for the purpose of building a house for the said *W. Cook*. I also agree to pay him £5 per cent. interest on the said sum."

If the signature of the testator to that memorandum is genuine, then there can be no doubt the Plaintiff will have made out her case; but it is alleged by the Defendants to be a forgery. They accuse the Plaintiff, therefore, of committing a forgery. It is of the highest importance that the truth should be ascertained. The Plaintiff has now married again, and her husband is a butcher in the city of *Lincoln*, and it is, therefore, an important question of character. I should have been well pleased if Mr. *Thornbury*,

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though entertaining a belief that the woman has supported her demand by forgery, had produced the documents, and had done all in his power to assist in ascertaining the truth. I think, as this is a matter of character, I should, in his place, have said, "You may see all the cheques in my possession if there is any probability of the truth being thereby discovered." He has, however, produced a bundle of about 130 cheques, which are admitted to be genuine; but then he says: "I have in my possession other cheques drawn upon the bankers of the testator, but the signatures to them are forgeries, and therefore I do not produce them." He does not say that these cheques are forged by the Plaintiff, but only that they are forgeries. I can see plainly that their production may be of great importance, because it is possible that the Defendant may be mistaken in thinking they are forgeries, and they may turn out to be genuine. The bankers, at any rate, seem to have acted upon them, and to have paid them, believing them to be genuine; and though upon examination they may now believe the cheques to be forgeries, they might not be able, upon cross-examination, to substantiate that allegation. Therefore the production of these cheques may be of the greatest importance to the Plaintiff, and I should be pleased if no objection were raised to their production; but this has not been acceded to, and the question has now been argued, and I must decide the rights of the parties.

The question rests upon a broad and general principle that every one has a right to the production of all documents relating to the matters in question in the suit, and it is said that these cheques do relate to the matters in question in the suit. But if this argument were valid, all documents relating to the estate of the testator which he has signed may be ordered to be produced for comparison of signature. I am not quite satisfied that the order I have already made for production could be supported as an adverse order, but I am satisfied there have been produced a sufficient number of cheques for comparison in order to ascertain the genuineness of these documents. It appears that Mr. *Netherclift*, the expert, has been called in, and having examined a great number of the cheques, he has declared that those which the Defendant has consented to produce are all genuine, but it is said that he considers the other cheques forgeries. The documents now produced are docu-

ments both before and after the date of the memorandum, and I cannot help thinking the Plaintiff has had inspection of a sufficient number already to settle the question upon the genuineness of this document; but what I have now to decide is, whether the Plaintiff, as a matter of right, is entitled to call for the production of these cheques, which are said to be forgeries; and I cannot see that she is. The section of the *Common Law Procedure Act* referred to enacts that "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses." But it is said these are not admitted, but proved to be inadmissible, and therefore that they could not be used as evidence of handwriting. I think that would be so. Therefore, if the Defendant says they are not in the handwriting of the testator, they must be proved to be so before they can be used. If the bankers say they are not in his handwriting, they may be asked, "Did you pay the cheques, and do you now believe them to be his signature?" Then they would state why they had altered their opinion. This course could not be taken without the production of the cheques alleged to be forgeries. Therefore it is, as I said, of the greatest importance to the Plaintiff that they should be produced. But still the question remains, whether, at this stage of the cause, I can order production. If I do not, the cause will come to a hearing without such production. Still, I do not think myself warranted in making the order; and I decide in this manner with satisfaction, because it would be laying down a rule that everything a man had ever signed should be produced in such cases; and secondly, the object may, I think, be attained by giving notice to the Defendant to produce at the hearing such documents as may be required; then, if they are not produced, it will be a circumstance against him. Therefore, on the whole, I come to the conclusion that I cannot order these documents to be produced.

As to the question of costs, I shall reserve that until the hearing, and if it turns out then that these documents are of use, I shall deal with the costs in a different manner from what I should now do.

Solicitors for the Plaintiff: Messrs. *Swann & Co.*

Solicitors for the Defendants: Messrs. *Collier-Bristowe, Withers, & Russell.*

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1874.
Feb. 25.

QUINTON *v.* CORPORATION OF BRISTOL.

[1874 Q. 1.]

Local Board of Health—Power to take Property—Town Improvements.

7 H.L. 290
10 C.B.N.S.

The Defendants, being the Local Board of Health for *Bristol*, were empowered by an order of the Secretary of State, confirmed by Act of Parliament, to take certain lands and houses specified in the schedule, for the purpose of widening and improving a street; and served the usual notices to treat under the *Lands Clauses Act* upon the Plaintiffs. The Plaintiffs filed their bill to restrain the Defendants from taking more of the property comprised in the schedule than was actually required for the purpose of widening the street:—

Held, that as the Defendants required this property for the improvement of the town, from which no profit or compensation was obtained, they were not confined, like railway companies, to the narrow limits of the property actually required for the purpose specified, but were at liberty to purchase all the property included in the schedule.

THE bill in this suit was filed by a number of persons who in April, 1869, were appointed trustees or feoffees of certain charitable trust property known as *St. Nicholas Church Lands*, in the parish of *St. Nicholas*, in the city of *Bristol*, against the mayor, aldermen, and burgesses of the city of *Bristol*, being the sanitary authority for the urban sanitary district of the city and county of *Bristol*, appointed under the *Local Government Supplemental Act*, 1868 (31 & 32 Vict. c. lxxxvi.).

By an order of the Secretary of State dated the 20th of May, 1868, made in pursuance of the *Local Government Act*, 1858, which order was confirmed by the *Local Government Supplemental Act*, 1868, after reciting that the Corporation of *Bristol* had petitioned for powers to take certain pieces of land for the purpose of widening, altering, and improving streets and roadways and making new streets in the city of *Bristol*, the Corporation, as the Local Board of Health for the district of *Bristol*, were empowered to put in force, with reference to the land referred to and described in the schedule to the order annexed, the powers of the *Lands Clauses Consolidation Act*, 1845, with respect to the purchase and taking of land otherwise than by agreement. The following was an extract from the schedule annexed to such order:—"Lands

and buildings intended to be taken for the purpose of widening, altering, and improving *Baldwin Street* and *Corn Street*. The quantity of land required for this undertaking will be 840 superficial yards." Then followed the description of the lands, messuages, buildings, and premises, which included premises belonging to the Plaintiffs and numbered 9, 10, 12, and 14 in the schedule and the plan deposited, being messuages and premises in *Baldwin Street* and *St. Nicholas Steps*. The Plaintiffs' property also included a cellar under *St. Nicholas Steps*, not specified in the schedule or shewn on the plan, and a cellar at the back of the premises numbered 14, connected with it by a passage, but not separately specified, and not shewn on the deposited plan.

At the date of the *Local Government Supplemental Act*, 1868, *Elizabeth Crawford* rented of the lessees the premises numbered 12, the cellar forming part of the premises numbered 14, and also the cellar under *St. Nicholas Steps*, with the passage from *Baldwin Street* leading thereto, but the cellar under *St. Nicholas Steps*, with the use of the passage as a means of access thereto, was now in the occupation of *James Brokenbrow* as under-tenant to *Hannah Williams*, who succeeded *Elizabeth Crawford* as under-tenant of the premises.

On the 5th of January, 1872, the Defendants issued notice to the Plaintiffs to treat and agree for the purchase by the local board, of the before-mentioned premises, including the cellar under *St. Nicholas Steps*, but not including the other cellar, unless it was considered as included as part of No. 14. The Plaintiffs held a meeting upon the subject of this notice, and passed a resolution that they desired to retain all such portions of the property as were not actually required for street improvements, and this resolution having been forwarded to the Defendants, they answered that such a course would be objectionable on the ground that it would prevent the Defendants from advantageously dealing with their salvage in consequence of the properties being intermixed, and the complicated questions of rights of light and air which would arise unless the whole was in one ownership. A lengthy correspondence then took place between the parties, which ended in the bill in this suit being filed praying that the Defendants might be restrained from taking any further steps towards compelling the Plaintiffs to

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sell the whole or any part of the messuages, buildings, and hereditaments in *Baldwin Street* and *St. Nicholas Steps*, numbered 9, 10, 12, and 14, respectively, on the maps and plans of the improvements proposed to be undertaken by the local board of health, save and except only such parts of the public-house numbered 12 on the said plans as lay between *Baldwin Street* and a straight line drawn from the front of a particular house therein named to the foot of *St. Nicholas Steps*, being in depth backwards from the said street about nine feet at the west end of such line, and thirteen feet at the east end thereof, and also from purchasing the whole or any part of the cellar under *St. Nicholas Steps* or the passage or courtyard leading between the said cellar and *Baldwin Street*, and that the Defendants might be restrained from obstructing the passage and courtyard, or preventing access to the said cellars in *Baldwin Street*. The Plaintiffs now moved accordingly.

Mr. *Cotton*, Q.C., Mr. *Shebbeare*, and Mr. *Glen*, for the Plaintiffs:—

The object of the Plaintiffs is to prevent the Defendants from taking more of the property described in their notice to treat than is required for the purpose of widening the street which they have power to make under the provisional order of the Home Secretary, confirmed by the *Local Government Supplemental Act* of 1868. The new street—*Baldwin Street*—adjoins *St. Nicholas Church*, and the rents of this property now in the hands of the Plaintiffs go towards the support of the church. It is, therefore, of importance to the Plaintiffs that they should retain as large a rental as they can, and they are of opinion that they can make a better use of the property by retaining what is not required for the street than by allowing the whole of it to be taken by the Defendants. All that the Defendants actually require for widening the street is a piece of land about twenty feet wide, abutting upon *Baldwin Street*, but what they say is, that for the purpose of salvage—that is, in order to enable them to obtain back part of the money which they expend in improving the street—they will take more land than is required for the purpose, and then sell it, for the erection of new houses at a better price. We say that they cannot compel us against our will to sell the whole of our property when we are not

willing to part with more than is required. We agree that the whole property is comprised in the schedule, with the exception of the cellars under *St. Nicholas Steps* and at the back of No. 14, but there is nothing in the Act to bind them to take the whole, nor to bind us to sell the whole, unless it is required for the street. In the case of *Eversfield* v. *Mid-Sussex Railway Company* (1), where a railway company were empowered by Act of Parliament to make and maintain the works mentioned in it, and to enter upon, take, and use such of the lands specified in the plans as should be necessary for such purposes, it was held that this provision did not authorize the company to take compulsorily and permanently land required only for the purpose of excavating materials therefrom, although within the limits of deviation, and they were restrained from taking steps to have the value of such land assessed. *Dodd* v. *Salisbury Railway Company* (2) is also an authority to the same effect.

It comes to this, that no more land can be taken than is required for the actual purpose of the work that is sanctioned.

The notice given by the Defendants does not specify the cellar at the back of No. 14, and, according to the evidence, it does not form part of the site comprised within the notice; consequently the Defendants have no right to take it under their notice.

Mr. *J. Pearson*, Q.C., and Mr. *E. S. Ford*, for the Defendants:—

The cases cited for the Plaintiffs are cases relating to railway companies, and have no bearing upon this question. The Defendants here are the Corporation of *Bristol*, who are taking the property for the purpose of forming a street for the benefit of the public. They derive no benefit from it themselves, and the money required for the purpose comes out of the pockets of the ratepayers. They have powers given them to take a certain quantity of land and the houses erected thereon, and are at liberty to take all they may think requisite for forming the street. This distinction is very clearly shewn in the case of *Galloway* v. *Mayor and Commonalty of London* (3). Lord *Cranworth* there said: "It must be observed that the Legislature, in providing for such an

(1) 3 De G. & J. 286. (2) 1 Giff. 158; 33 L. T. 311.
(3) Law Rep. 1 H. L. 34, 45.

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object as that of widening and improving the streets of the metropolis, has to deal with a subject totally different from that of enabling a body of adventurers to form a railway. In that latter case the persons seeking the aid of Parliament are bound to shew that what they are proposing to do is of such public importance as to make it reasonable that they should be enabled so far to interfere with the rights of private property as to compel the owners of the land required for the railway to sell it to them at a fair price. The Legislature has no concern with the question as to how the persons embarking in the undertaking are to obtain funds to pay for the construction of the railway. The railway will become the property of the speculators, and will itself repay them (at all events it is anticipated that it will repay them) by the tolls levied on it, the outlay they have made. But in the case of a public body, like the mayor and corporation of the city of *London*, undertaking improvements in the metropolis, the matter is very different. When they have made a new or widened an old street, they will necessarily have incurred a very great expense, for which they can get no return. The new or improved street is dedicated to the public, and, unlike the railway, yields no profit to those by whom it has been made. In order to meet this difficulty, and to enable corporations to reimburse themselves, the course has been to authorize them to take compulsorily not only the buildings actually necessary for forming the streets or other projected improvements, but also other neighbouring lands and buildings, the value of which, and the proper mode of dealing with which, the Legislature considers to be connected with, and dependent upon, the projected improvements." The object of the Model Act affecting the city of *London* was to enable those at whose cost the improvements had been made to appropriate to themselves at their old value the houses and lands adjoining the improvements, and then to sell them at their increased value, so that they might be able wholly or partially to reimburse themselves the outlay they had made. So in this case nothing is more reasonable than that the Act of Parliament should give power not only to take property within the width of the street from house to house, but also to take so much as may be necessary for improving the locality, and by obtaining a higher rent for the new houses that may be built,

to get some increase of rental, and thereby reduce the expenses of the work. Lord *Chelmsford's* observations in that case were to the same effect. In this case it is more particularly requisite that the corporation of *Bristol* should take all the property comprised in their Act, because the houses interlace one with the other, so that a part of one house overlaps the other and is built upon it, and it would be impossible to deal with one without the other. On the other hand, the Plaintiffs are desirous of making us pay £600 in new-fronting the house, and this must come out of the pockets of the ratepayers without any return for the outlay.

Then we say that the Plaintiffs ought to have made their objections at an earlier period than they did. Our notices were issued in November, 1867, and our plans might then have been seen by the owners of the property intended to be taken. On the 13th of September, 1868, the petition was presented to the Home Secretary for leave to put in force the powers of the *Lands Clauses Act*, and a public inquiry was held in *Bristol* at the direction of the Secretary of State on the 24th of March, 1868, and no objection was made by the Plaintiffs, and the consequence was that the Act of Parliament was passed which gave the Defendants power to take all this property and to re-sell so much as should not be actually required for the new street.

Then with regard to the cellar, the evidence is that this cellar belongs to a particular house, although it is detached from it, as many cellars are. At the time the notices were issued it was in possession of the owner of the house, but it was afterwards let off to another person. It would have been most unreasonable on our part to have given them notice to take the house without the cellar.

Mr. *Cotton*, in reply:—

We rely upon the law, which says that when parties go to Parliament to get compulsory powers, they are limited to the objects for which they go to Parliament. There was no necessity for the parties to have raised any objection to their property being taken, because they rested on what they believed to be the law, that no more land could be taken than was required for the purpose of the new street. The case of *Galloway* v. *Mayor and Corporation*

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of London (1) proceeded on this: That the very Act under which the corporation were dealing contemplated their taking more land than they wanted, and that was an intimation that they were not to be cut down in the narrow way that railway companies are cut down. The case proceeded upon a particular Act, the Model Act. The land was in fact taken under an express provision in the Act of Parliament; and, moreover, it was held in that case that the word "street," as applied to the particular improvement about to be effected, included the roadway and the houses on each side of it. That is entirely different from this case, where the street is merely the roadway. It is true that the object for which the property is required differs from a railway. One is to promote the interest of the town, and the other to promote the interest of the shareholders; but in construing the Acts the same principle must be applied, and the Court must see what the powers are, and must keep the parties within those powers. The object of this improvement was to widen the thoroughfare, and no more. No doubt the Plaintiffs might have compelled the Defendants to take all the houses when they required only a few feet from them, and in that case the surplus property must have been sold, but the Plaintiffs cannot be compelled against their will to sell more than is wanted if they think it for their interests that part only shall be taken.

Then as regards the cellar, we say they have not described it in any way upon their deposited plans. It is separate from the house, and the only connection between them is, that the passage leading to the cellar goes under this particular house.

SIR R. MALINS, V.C.:—

This is a motion to restrain the corporation of the city of *Bristol* from taking any further proceedings to ascertain the value of certain premises in the city of *Bristol*, which the corporation require to take for the purpose of improving the town, and in particular for widening and improving a street called *Baldwin Street*. The Plaintiffs are a very numerous body of trustees, who hold this property for the benefit of a particular church in the city of *Bristol*. They come here to protect their property, because they say that what the corporation of *Bristol* are about to do will

(1) Law Rep. 1 H. L. 34.

be very injurious to their interests. I confess that I am unable to see that their interests would be in the slightest degree affected, because I am satisfied that whether the corporation take the whole of this property, or part of it, the Plaintiffs will get the full value of it, and I believe they will be quite as well off after the property is taken as they are now, and will moreover have the advantage of its being situated in a much better street than it now is. Interest in the question I do not believe the Plaintiffs have. However, I must decide it according to the rights of the parties.

The question arises in this way: Certain proceedings have been taken by the corporation for the purpose of obtaining a certain property necessary for improving the city, and particularly to widen this particular street, and that has resulted in an order which was confirmed by the Act which has been referred to of the 31 & 32 Vict. c. lxxxvi. It contains, amongst other recitals, this: "Whereas the corporation of the city of *Bristol*, by the council of the said city, acting as the local board of health, in and for the city and county of *Bristol*, to which the *Public Health Act*, 1848, was duly applied, and in pursuance of the provisions of the 75th section of the *Local Government Act*, 1858, and after complying with the requirements of that section by duly giving and serving all notices thereby directed, presented a Petition under the seal of the said local board to one of Her Majesty's principal Secretaries of State, for authority to put in force the *Lands Clauses Consolidation Act*, 1845, to enable the aforesaid local board of health to purchase, otherwise than by agreement, certain pieces of land for the purpose of widening, altering, and improving streets and roadways, and for making new streets within the aforesaid city of *Bristol*."

It is admitted by the Plaintiffs that they were duly served with the notice to treat, which, for this purpose, I may describe as extending to the whole of the houses. There are at all events four houses. The whole of the houses (including, in my view of it, the appurtenances) are described in the schedule, and shewn on the deposited plan, and if there is power given to take all that is shewn on that plan, then the Plaintiffs' case fails.

But the Plaintiffs say that although they have the power upon the deposited plan of taking the whole, they can only take so much as is required for the purpose of widening the street. I have

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had a good deal of experience in these matters, and I have a very lively recollection of that class of cases, perhaps not the most reasonable, to be found in our reports, where railway companies have been so restricted as to taking lands, that although they had parliamentary powers to take them, they could only take so much as was required for the purpose of constructing their works, of which the two cases—prominent instances—are *Dodd* v. *Salisbury and Yeovil Railway Company* (1), and which I see by a note was affirmed on appeal (2), and *Eversfield* v. *Mid-Sussex Railway Company* (3). There the railway companies were restricted down to the narrowest limits that were necessary to construct their works. I was at first under the impression that a similar principle would apply to taking houses in a town for the purpose of improving streets by a corporation, but I think, on further consideration, and particularly of the authorities cited by Mr. *Pearson*, as well as upon the good sense of the thing, I must come to the opposite conclusion; and I may say that although I have known many cases where there has been a power to take something appurtenant or belonging to a house where the proprietor has contended that the company could not take a part without taking the whole, under the 92nd section of the *Lands Clauses Act*, I do not remember a case before in which this question has arisen with regard to the power of taking part of a house, because the Plaintiffs here contend that the corporation can only take a part of the house, and are therefore only entitled to take a slice of ten or twelve feet, as it is admitted it would be necessary to do, and they say there is an obligation on the part of the corporation to put a new front to the house, and make that which I believe would be uninhabitable and utterly useless, inhabitable. Such houses as these, if treated as suggested, would, in my opinion, be utterly uninhabitable and perfectly useless.

Therefore, considering that this purchase is not for the purpose of a railway, but for the purpose of improving a town, and that these trustees, the Plaintiffs, had notice of the intention of the corporation to take the whole of these houses, I think the plain sense of the thing is that they must have understood, not that they were

(1) 1 Giff. 158. (2) 1 Giff. 164.
(3) 3 De G. & J. 286.

to take a small part only, in other words cut a slice off the house, and leave the rest; but that taking a house generally implies an undertaking to take the whole, if they want it. They must well have understood that if they asked for the power of taking the houses, by not opposing they intended to give them leave to take the houses.

Then there is another reason for my present opinion. I think I must apply to this question that passage in Lord *Cranworth's* judgment in the House of Lords, where he says that all these cases of railways have no application to the cases of corporations. The corporation of *Bristol* are not taking these houses for the purpose of profit. They are taking them for the purpose of improving the city, and when that is the case I think Lord *Cranworth's* observations, referred to by Mr. *Pearson*, are entirely applicable.

I think, therefore, the fair meaning of the Act is, that they are to take those houses described in the deposited plan, taking the whole of them in order that when they have taken them they may let out the sites in such a manner as will enable persons under their authority, by leases or otherwise, to erect such houses as will be adapted to the general condition of the streets.

I am of opinion that the principles of the railway cases do not apply to this case, and, consequently, that the Plaintiffs have entirely failed in establishing any right to the interference of the Court in the way proposed.

Then another ground argued has been, that there is no power to take a cellar because it is not mentioned in the deposited plan; but I am satisfied that, although the cellar is not mentioned, the site is mentioned, and I must, upon the evidence, take the cellar to be included in the notice to treat. I am of opinion, therefore, that this part of the case also fails.

The result therefore is that the motion must be refused. I do not think it is a case in which I should say anything about costs at present. I shall therefore simply refuse the motion.

Solicitors for the Plaintiffs: Messrs. *Abbott, Jenkins, & Abbott.*
Solicitor for the Defendants: Mr. *Travers Burges.*

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1874

Feb. 27

In re TUMACACORI MINING COMPANY.

Company not having commenced Business—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 79—*Winding-up Order.*

4 Ch D. 818
14 Ch D 109

Where a company had been registered for more than a year without commencing business, and had therefore come within the 79th section of the *Companies Act*, 1862:—

Held, that the Court could not refuse a winding-up order upon the application of a shareholder, notwithstanding that the company had no money paid up and no debts, and that the order was opposed by a majority of the shareholders.

THIS was a Petition for a compulsory order to wind up the *Tumacacori Mining and Land Company, Limited.*

The company was registered on the 2nd of April, 1870. It was incorporated for the purpose of purchasing and holding "all the lands in the territory of *Arizona*, in the *United States of America*, comprising about 106,000 acres of mineral, arable, and pasture lands, together with the mineral rights of, in, and pertaining to the said lands now held by *Christopher E. Hawley*." The objects of the company were also described to be the working of the mines comprised within the property, the cultivation of the lands, the construction of railways, tramways, and canals through and over the lands, and many other purposes of a most varied description; and the articles of association provided that the company might make and carry into effect arrangements with respect to the union of interests, or amalgamation, either in whole or in part, with any other companies or persons carrying on business of a similar nature to this company, and upon terms either that this company or the company of persons with whom it should amalgamate should carry on the amalgamated business, and might sell or mortgage, by bonds, debentures, or otherwise, to any company, person, or persons, all or any part of the company's business or property, and for all or any of the said purposes, if necessary, to establish any new company or companies, and to take, hold, or sell shares in any such other company. All the shares in the company, except seven, had been issued as fully paid-up shares, 200 of such shares having been allotted to each of the seven directors, who had signed the memo-

randum of association in respect of only one share each. The company had never taken possession of the land said to have been purchased, and no business of any kind had been carried on since the formation of the company. No money had been paid or received; no account had been entered with any banker. There was no cash-book or banker's pass-book, and no creditors, except the directors, who alleged that their salaries were due to them. The intention of the projectors of the company seemed to have been that the whole of the purchase-money for the property should be paid in fully paid-up shares to *James Eldridge*, who was the holder of a concession of the territory from the *United States* government, and that the said *J. Eldridge* was to raise, by bonds or debentures, sufficient sums of money to enable the company to carry on the works projected.

The Petition was presented by *F. W. Eldridge*, the son of *James Eldridge*, who was the holder of 10,000 fully paid-up shares, the grounds of the petition being that the company never having carried on business, and not being in a position to do so, it was just and equitable that the company should be wound up under the 79th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89). The petition was supported by another holder of 55,000 shares.

It was opposed by the directors and by the *Crédit Foncier*, who were holders of 133,000 shares, on the ground that the company had entered into an agreement with a company called the *Senora Company* for the transfer to that company of all the property of this company, that they had power under their articles of association to enter into such a contract, and that it would be for the benefit and the interest of all the shareholders that the proposed transfer should be carried into effect.

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, in support of the Petition :—

The Petitioner is the holder of 10,000 shares in the company, and the Petition is supported by another holder of 55,000 shares; but it is opposed by the holders of 133,000 shares; consequently we cannot by agreement amongst ourselves effect a voluntary winding-up of the company. There has already been a meeting of shareholders, and although that meeting was convened by the directors for the purpose of considering the propriety of passing a

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resolution to wind up, they eventually opposed it on the ground that there was an opportunity of selling the property of the company to another company formed for the purpose of taking over the business. We contend that there is no power in the articles of association to effect any such sale. The power is to carry into effect arrangements with respect to the union of interests or amalgamation with other companies. Amalgamation cannot mean a complete transfer of the business and sale of the property such as the directors contemplate in this case. This was decided in *Clinch* v. *Financial Corporation* (1), *Higgs's Case* (2), and *Imperial Bank of China* v. *Bank of Hindustan* (3). This is a subsidiary power to take shares in another company, and not to transfer all the shares; but we have a right to a compulsory order for winding up. This is a company registered under the Act of 1862, and it now falls within the statute 25 & 26 Vict. c. 89, s. 79, sub-s. 2, since it has not commenced its business within a year from its incorporation. There has been no business whatever transacted. The land has not been taken possession of, and even the deed of conveyance has not been registered. No money has been paid upon the shares and no debts have been contracted. The case of *Princess of Reuss* v. *Bos* (4) is conclusive upon this point, for there it was held that, if the company was a registered company, and fell within the 79th section of the Act of 1862, the Court would order it to be wound up.

Mr. *Higgins*, Q.C., and Mr. *Chester*, for holders of 55,000 shares, supported the Petition.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for the company:—

The directors of this company are opposed to the winding-up, because they think that by means of another company, formed upon a more solid basis, the business may be worked profitably. There is no doubt that the property is valuable if it can be properly worked; but, from causes over which the directors have had no control, and more particularly on account of the war which has been going on in the territory where the land is situate, it has

(1) Law Rep. 5 Eq. 450.
(2) 2 H. & M. 657.
(3) Law Rep. 6 Eq. 91.
(4) Ibid. 5 H. L. 176.

been found impossible to take possession of the property. In this view of the case the directors are supported by the great majority of the shareholders, amounting to holders of 133,000 shares. The Petitioner himself is the son of the gentleman who has sold the property, and he is, in fact, a holder of the shares on behalf of his father, who was to have the greater part of the shares transferred to him as paid-up shares. The interest of the Petitioner should not, therefore, be set in opposition to the wishes of the majority of the shareholders, who are in favour of amalgamating the business of the company with another company capable of efficiently working the concern. The wishes of the majority ought to guide the Court, and the most effectual means of ascertaining those views would be by directing a meeting of the shareholders to be held, as was done in *In re Brighton Hotel Company* (1) and other cases. By the 91st section of the *Companies Act* the Court has power, in all cases of winding-up, to consider what is most for the interest of all parties, and to have regard to the wishes of the shareholders. It is the general policy of the law that the wishes of a majority should bind the minority, and it should not be in the power of a small shareholder in a company to have a compulsory order against the wishes of the rest.

Mr. *J. Pearson*, Q.C., and Mr. *Latham*, appeared for the *Crédit Foncier*, who were transferees of a large number of shares.

Mr. *Glasse* objected to the *Crédit Foncier* being heard, since they became shareholders after the presentation of the petition for winding up, and referred to the 153rd section of the *Companies Act*.

The VICE-CHANCELLOR:—The 153rd section is this: "Where any company is being wound up by the Court," all dispositions of the property of the company and every transfer of shares shall be void. This company is not being wound up, and therefore it does not come within the clause.

Mr. *Pearson* then said that the only object of the *Crédit Foncier* in opposing the Petition was to avoid the enormous expense caused

(1) Law Rep. 6 Eq. 339.

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by a winding-up order. He cited *In re Langley Mill Steel and Iron Works Company* (1), where it was held that a winding-up order could not be claimed *ex debito justitiæ* by an unpaid creditor of a company, and the Court would have regard to the wishes of the majority of the shareholders.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

This is a very peculiar case, and, as far as I know, it is a case of the first impression.

The company was registered on the 2nd of April, 1870. It was incorporated for the purpose of purchasing and holding "all the lands in the territory of *Arizona*, in the *United States of America*, comprising about 106,000 acres of mineral, arable, and pasture lands, together with the mineral rights of, in, and pertaining to the said lands now held by *Christopher E. Hawley*," and so forth. I think the main and principal object of the company was undoubtedly mining under those lands. It is very wide in its objects. It describes many other things, but I think that may be considered as the main object of the formation of the company. Its capital was to be £2,000,000 in 200,000 shares of £10 each. One of the peculiarities of this company, with this enormous amount of capital of £2,000,000, is, that every share has been issued as fully paid up; but a still more extraordinary fact of the case is, that every share has been issued without the company receiving a shilling from any of the shareholders; and although the company has been in existence now close upon four years, it never has, as a company, received or paid a single shilling. It is also not only singular, but I must say not very creditable to such a company, that although its directors are gentlemen of position in society, one being a nobleman, another a baronet and a member of Parliament, others being merchants, and there being a solicitor and persons of that description, they each of them subscribed the memorandum of association for one share only, rendering themselves liable to no more than £10, and at the same time received a gratuity of 200 shares fully paid up. I cannot, on this

(1) Law Rep. 12 Eq. 26

occasion, and never will on any occasion, allow such a transaction to pass without expressing my surprise that any man can do a thing so discreditable to his position as to receive a gratuitous qualification as a director of a company. However it was done in this case; and I deeply regret to see the names of those by whom it was done. But, another singular circumstance is, that everybody has received his shares gratuitously. Two hundred thousand shares have been issued, and not a penny paid; for it is the admission of both sides that this company has never had a cash book, that it has not a banker's book, and, as far as I have heard, it has not a debt probably worthy the name of debt, for it is not suggested that there is anything due but the directors' salary, which is too ridiculous a thing to contemplate, and the allowance which is said to be due to Mr. *James Eldridge* for keeping a table, and so forth, which is as ridiculous as the claim for the directors' salary. Therefore, here I have a company, in which, if I make an order to wind up, there can be no list of contributories, for there is nobody liable to contribute a penny, and it is admitted there are no creditors.

What am I to do in such a state of things? It is perfectly clear that the object of the Winding-up Acts is to settle the rights of contributories, creditors, and everybody interested in the company. In this case there is no money to take possession of. If I make the winding-up order there must be an official liquidator, because winding up without the aid of an official liquidator is, in my opinion, entirely out of the question. Therefore there must be an official liquidator. Where am I to find the money to pay him? There are only seven shareholders who are liable to be put on the list of contributories, each of whom is liable for £10. Therefore all I can get is £60, because one of them is said to have paid his £10, though that payment, I must say, is a very equivocal one. So that here is a company which has been going on for four years, and up to the present time, looking at it in the most favourable way, it has received only £10.

I am much inclined to think that, under such circumstances, persons who get into such concerns as these ought to be left to get out of them as they can; for it is hardly worth the consideration of the Court to aid them, or to do anything for them whatever;

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and it has been the impression upon my mind during a considerable part of the argument that that is the proper course to adopt.

But I must take the Act as I find it. In the case of the *Princess of Reuss* v. *Bos* (1) in the matter of the *International Land Credit Company*, which was a company with an enormous capital, and which was formed for the purpose of purchasing and selling land in *Austria* (in this country it had an office, and in that office it was proved that there was a chair, a table, and, I believe, a small desk —there was nothing else). I thought as there was nothing to be got in this country, and whatever could be got could only be got by selling land in *Austria*, that that was not a company within the meaning of the Act, which was proper to be wound up in this country, because I felt satisfied that no good could come of it. I accordingly refused to make the order. From me it went to Lord Justice *Giffard*, sitting alone, who made the order to wind up. From him it went to the House of Lords, who affirmed his decision. Therefore it is perfectly clear that I was wrong in my conclusion, in not making an order to wind up that company, which I was satisfied could do nothing; and I believe the result has been that I was quite right in that; for it has been in my Chambers for four years, and nothing has been done except to get in some small assets, out of which I have been able to remunerate the official liquidator up to a certain time. However, as I understand that decision, it goes to this extent, that wherever there is a registered company under this Act there is the right to the winding-up order.

If this had been a creditor petitioning, and I have already shewn there cannot be such a person, for there is no creditor, considering that the case falls strictly and literally within the subdivision of sect. 79, which provides that the winding-up order may be made whenever the company does not commence its business within a year of its incorporation or suspends its business, it is perfectly clear that this company never having done anything and never having commenced business (and I am perfectly satisfied that if it continues it never will commence business), it falls strictly within the description of a company which has not commenced its business within a year. Therefore, if it were a creditor who was petitioning, it is

(1) Law Rep. 5 H. L. 176.

clear there is the right to have the order to wind up; but the order to wind up may be made on the application of a creditor or a contributory. Then what is to be done in this case? If I do not make an order to wind up, what is to become of this property? because both sides agree that there is property here of value, and that although they have not worked, somebody may be willing to work, and it may be sold for money. If I refrain from making an order, how is the question to be settled?

It has been argued that under the 4th section of the memorandum of association the directors of this company have the power of disposing of "all or any part of the company's business and property, and for all or any of the said purposes, if necessary, to establish any new company or companies, and to take, hold, or sell shares in any such other company." I am of opinion that that clause does not apply to the existing state of things at all, but merely refers to amalgamation with other companies, or something of that sort, while it is a going company, not in the case of a winding-up.

The difficulty being that which I have stated, what are the views of the different parties? My making any order has on one side been strenuously opposed; but the very parties who now oppose any order being made to wind up compulsorily had, so recently as the 20th of January last, made up their minds to submit a resolution to a meeting of the company to wind it up voluntarily. What do they say by their affidavit? They do not say that it cannot be wound up voluntarily, and if it can be wound up voluntarily it can be wound up compulsorily; but they say, "For certain reasons the resolutions, of which notice had been given that the company should be wound up voluntarily, were not proposed at the meeting, because it was thought better to defer the liquidation of the company until the agreement with the *Senora Company* had been carried into effect." Their view, therefore, when they went to that meeting was to wind up, and if so, why have they changed their views so much? They say it is not a desirable thing to wind up, and that I must call a meeting. It has been strongly argued that I should call a meeting. I have the power to do so. But suppose I do? I see very plainly that one side, namely, the side represented by Mr. *Cotton* and Mr. *Pearson*, has the command of 133,000 shares, and that the other side, who are for the wind-

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ing-up has the command of only 68,000. What would be the utility of my calling a meeting when those having the 133,000 shares would be sure to carry everything their own way? It would be a mere delusion. It is very true that in the case of the *Brighton Hotel Company* I did call a meeting, as I did in the case of another company, but those were companies which were actually carrying on business, and where I had a doubt as to whether it was an expedient thing to wind up. In the case of the *Brighton Hotel Company* money was wanted, and I thought it might be worth their while to endeavour to find it. The result of my calling a meeting was, that money was found, and the company is now going on earning large profits. But to call a meeting here, which cannot by any possibility determine whether it is advantageous to carry on the business or not, is out of the question. The only question is, how to dispose of the property. The directors say they have entered into an arrangement by which another company is to be formed, and by which they are to get certain benefits, a certain number of ordinary shares are to be created and a certain number of preference shares. It is perfectly clear, whether they are ordinary shares or preference shares, they cannot oblige the shareholders of this company to go into the new concern, and, therefore, I am clearly of opinion that any efforts to be made to dispose of the property of the company without the aid of this Court must be futile.

Under all these circumstances, although I feel great difficulty as to what is to be done, and what course the company may take, and althoug h I am strongly impressed with the propriety, if I were at liberty to do so, of leaving them to settle their own affairs and to sell their own property, for which they have not paid a penny, in the best way they can, yet, seeing that the company is registered, and has property to be disposed of, I think, upon the whole, I cannot refrain from making an order to wind it up compulsorily. Whether I shall be able to carry that order out is another question, because I certainly feel a difficulty. First of all, I make an order compulsorily to wind up. That order will be taken into Chambers, and the first thing will be to appoint a liquidator. If I cannot find a liquidator, it may then be necessary to stay the order and to take some other steps; but in the mean-

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while, as both parties agree that there is property of value, I hope some one will be found to undertake the liquidation; and under the orders of this Court the property can be disposed of to some other company or in some other way, and I am perfectly satisfied that if sold at all it can be sold to much greater advantage by the official liquidator under the orders of this Court than it can ever be by a body like this, where every proposal which is made by the one party is sure to be opposed by the other.

Therefore, on all these grounds, seeing that there are considerable difficulties in the way of the case, as I have pointed out, I am of opinion that the proper course is to make the usual order to wind up compulsorily.

Solicitor for the Petitioner: Mr. *W. T. Manning.*
Solicitor for the Company: Mr. *Heritage.*

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1874
Feb. 28.

COTTERELL *v.* STRATTON.

[1868 C. 141.]

Redemption Suit—Mortgage under £1000*—Taxation of Costs—Higher or Lower Scale.*

In a suit to redeem a mortgage, where the amount due at the time of filing the bill is under £1000, notwithstanding that the mortgage was made to secure a larger amount, the Defendants' costs must be taxed on the lower scale.

Affirmed 6 Ch. App. 514.

THIS was an adjourned summons upon the application of the Defendants that the Taxing Master might be ordered to review his taxation of costs in this cause, and that he might be directed to tax the Defendants' costs upon the higher scale applicable to suits in which a larger sum than £1000 was claimed.

The bill was filed by the Plaintiff for redemption of a mortgage executed by him to the *No.* 3 *Borough of Lambeth Benefit Building Society*, dated in November, 1858, whereby the society advanced to the Plaintiff, upon security of certain leasehold houses, a sum of £900. The Plaintiff, upon the execution of the mortgage, had subscribed for fifteen shares of £60 each in the society, amounting

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to £900, under an arrangement that he should repay the same in ten years by monthly instalments of 14*s.* 2*d.* per share, making for the fifteen shares the sum of £10 12*s.* 6*d.* monthly, or £127 10*s.* annually, which in ten years would amount to £1275; and the mortgage was made for securing the repayment of that sum, and such other payments in respect of the said fifteen shares as were by the rules of the society provided respecting members receiving the amount of their shares in advance, and subject to redemption by the Plaintiff upon the full payment of such sums.

The Plaintiff duly paid his instalments up to February, 1861, but having been unable to continue the payments any longer, the society took possession of the mortgaged premises, and entered into receipt of the rents and profits, which amounted to about £141 per annum. In December, 1864, the Plaintiff applied to the society requesting to be informed what amount was due to them and would be required for redeeming the mortgage. The society in answer stated a much larger sum than the Plaintiff believed to be due, and after some correspondence on the subject of the accounts the Plaintiff filed his bill for redemption of the mortgage, and to restrain the Defendants from proceeding to sell the mortgaged premises.

Upon taking the accounts it turned out that at the time of filing the bill the amount due from the Plaintiff was £517, and the Master, in taxing the Defendants' costs, which were ordered to be paid by the Plaintiff, had taxed them on the lower scale instead of the higher scale.

The Defendants now asked that the Master might be ordered to review his taxation, and that he might be directed to tax the costs on the higher scale.

Mr. *Hugh Williams*, in support of the summons:—

The mortgage in this case was, in fact, to secure a sum of £1275, being the amount which the Plaintiff, as a member of the *Lambeth Benefit Building Society*, had contracted to pay, in respect of instalments and fees, for the advance to him of £900. The account included rents and other sums of money far exceeding £1000, and therefore the case does not come within the rule, "that in all suits for foreclosure or redemption in which the mortgage whereon

the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £1000," the lower scale of charges shall be applicable. The cases of *Flockton* v. *Peake* (1) and *Grimes* v. *Harrison* (2) decide that the Court looks to the amount in dispute, not to the amount actually recovered. The case of *Reade* v. *Bentley* (3) is also an authority, where the amount recovered was only £800, and still it was decided by Vice-Chancellor *Wood* that the costs should be taxed according to the higher scale; and in the *Earl of Stamford* v. *Dawson* (4), Vice-Chancellor *Wood* directed the costs to be taxed on the higher scale, although the property in question was under the amount or value of £1000. It is submitted that this is substantially a suit in reference to a sum greater than £1000, and that the amount or value of the mortgage whereon the suit is founded is not under that amount, and, consequently, that the Master ought to be directed to review his taxation, and to tax the Defendants' costs upon the higher scale.

Mr. *Bristowe*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff, were not called upon.

SIR R. MALINS, V.C.:—

I think the proper criterion for ascertaining the amount or value of the mortgage whereon a redemption suit is founded, is not the sum of money which was originally advanced, because that might possibly be £20,000, and might be reduced below £1000 by payments made by the mortgagor, but the sum actually due at the time the bill is filed. Here the sum originally advanced to the Plaintiff by the *Benefit Building Society* upon a common mortgage was £900, although it was intended to secure other sums payable as fines and fees under the rules of the society. The sum originally advanced, however, was reduced by means of payments by the mortgagor and by the receipt of rents, while the mortgagees were in possession, to the sum of £517, and that sum only was due at the time the bill was filed. The Defendants ought to have known the actual amount due when applied to by the mortgagor, and it was their duty to have informed him at once how

(1) 12 W. R. 1023.
(2) 27 Beav. 198.
(3) 3 K. & J. 271, 280.
(4) Law Rep. 4 Eq. 352.

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much he would have to pay in order to redeem the mortgage. There was nothing to be done in the suit but to ascertain the amount due, and if the Defendants had distinctly stated that fact the suit would have been unnecessary. If the Plaintiff had known the exact amount, and had tendered the sum of £517, the Defendants would have been bound to accept it. I think, therefore, that, as the amount due at the time of filing the bill was not more than £517, the suit comes within the rule as to redemption suits in which the mortgage whereon the suit is founded is under the amount or value of £1000, and that the Master was right in taxing the costs according to the lower scale of charges.

In the case of the *Earl of Stamford* v. *Dawson* (1) there was an inquiry as to damages, and a prayer for a receiver and an injunction. It was a suit founded on fraud, and the exact amount at issue could not be defined; and *Grimes* v. *Harrison* (2) was not a simple suit for redemption. It was instituted to have a trust fund replaced, and to obtain a winding-up of the company.

I shall, therefore, dismiss the summons, and order the Defendants to pay the costs.

Solicitor for the Plaintiff: Mr. *Dinn.*

Solicitors for the Defendants: Messrs. *Wyatt, Hoskins, & Hooker.*

V.-C. M. 1874 *March* 25.

HULL *v.* CHRISTIAN.

[1861 H. 160.]

Will—Construction—Annuity to Trustee—Gift coupled with Duty.

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee:—

Held to determine on the cesser of active trusts by the payment of the whole of the trust property to a person absolutely entitled, without a devolution of the office of trustee on any other person.

THIS was a Petition by the Plaintiff in the suit for payment out of Court of a fund standing to the credit of the cause.

The suit was instituted in the year 1861 for the administration

(1) Law Rep. 4 Eq. 352. (2) 27 Beav. 198.

of the estate of the Plaintiff's great-aunt, *Sarah Rowe*, who died in 1847, and by her will, which was dated the 20th of July, 1841, after directing the payment of her debts, funeral and testamentary expenses out of her personal estate, and bequeathing certain legacies and annuities, amongst which was an annuity of £100 to the Defendant *William Wareing* (whom she also appointed one of her trustees) so long as he should continue to execute the office of trustee under her will, gave all her property, both real and personal, to her trustees upon certain trusts, under which, in the events which happened, the Plaintiff became absolutely entitled beneficially on attaining her age of twenty-one years, which event took place on the 14th of August, 1873.

The residuary estate of *Sarah Rowe* had been from time to time paid into Court to the credit of the cause as it was realized, and, subject to certain allowances made for the maintenance of the Plaintiff during her minority, and to the payment of such annuities as remained subsisting, including that of Mr. *Wareing*, had been accumulated.

By an order of the 19th of March, 1868, made on further consideration, it was, amongst other things, ordered that a sum of £3333 6*s.* 8*d.* should be set apart to answer the annuity of Mr. *Wareing*. There was no other annuity now subsisting, but Mr. *Wareing* was still living.

The Petition asked that this fund of £3333 6*s.* 8*d.* might be paid out to the Plaintiff together with the other funds in Court.

Mr. *Glasse*, Q.C., and Mr. *North*, for the Petitioner:—

The Plaintiff is now entitled to receive the testatrix's estate, and the trusts of the will have entirely ceased. Mr. *Wareing's* annuity has consequently expired also.

Mr. *Cotton*, Q.C., and Mr. *Cozens-Hardy*, for Mr. *Wareing*:—

The annuity is not given for Mr. *Wareing's* trouble in executing the trusts of the will, and is independent of any active duties he might have to perform. He continues to be a trustee till his death, or till some other person has been appointed in his place and on his retirement. The question, moreover, has been adjudicated upon by the order on further consideration directing the setting

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apart of the £3333 6*s.* 8*d.* at a time when all active duties as trustee had practically ceased. Even in *Baker* v. *Martin* (1), where the annuity was expressly stated to be for the annuitant's trouble, the duty of shewing affirmatively that the duties of the trusteeship had ceased was thrown upon the party claiming under that supposition.

Mr. *Glasse*, in reply, referred to *Henrion* v. *Bonham* (2), and said that the *ratio decidendi* of *Baker* v. *Martin* was that there were assets outstanding.

SIR R. MALINS, V.C.:—

I am very sorry that the Petitioner should think it worth while to disturb the arrangement made by the order of the 19th of March, 1868. But still, however wealthy she may be, she is entitled to have her rights determined, and I have to decide the question whether the annuity has ceased or not.

The annuity was given to Mr. *Wareing* so long as he should continue to execute the office of trustee. He executed the office from 1847 till the present time, when every trust has come to an end. There is no ground for any suggestion that there is any other trust property than that represented by the fund in Court, and the trusts are entirely at an end. Now, what is the meaning of the expression? Surely from its very words it implies remuneration of service to be rendered, and when the trouble ceases the remuneration must also cease. I must, therefore, come to the conclusion that the annuity was to continue so long only as Mr *Wareing* should continue to have the trouble of executing the trusts of the will. Mr. *Cotton* admits that if he had resigned the trusteeship the annuity must have ceased. But another way of terminating the trusteeship was by the cessation of the duties of the trustee.

Therefore, though I am sorry that the question has been raised, the order must be according to the prayer of the Petition.

Solicitors: Messrs. *Norris, Allens, & Carter;* Mr. *Worthington Evans.*

(1) 8 Sim. 25. (2) Dru. 476.

WILLIAMSON *v.* WILLIAMSON.

V.-C. B.
1874
March 6.

[1868 W. 132.]

Lessor and Lessee — Underlease — Covenant not to assign or underlet without License—Like Provisions.

Where a lessee subject to a covenant not to assign without the lessor's consent, having obtained such consent, agreed to grant an underlease to contain the like provisions as the lease:—

Held, that in the covenant in the underlease against assignment the original lessor was the person whose consent should be required.

Revd by L.J.L.R. 9 Ch 729

ADJOURNED summons raising a question upon the frame of a clause contained in a draft underlease which was being settled in Chambers.

By indenture of lease dated the 20th of April, 1861, Viscount *Sidmouth* demised unto *H. H. Williamson* (since deceased) certain mines of coal and ironstone for a term of forty years from the 29th of September, 1860. The lease contained a proviso that if the rents or compensations, or any part thereof respectively, should have been unpaid for sixty days after the days of payment (the same having been first demanded in writing), and no sufficient distress be found on the demised premises to answer such arrears, "or if the lessee or lessees, or any of them, should at any time or times thereafter during the said term set, let, or part with possession of the said premises thereby demised, or any part or parts thereof, or transfer the lease" (now being stated) "for all or any part of the term thereby granted to any person or persons whomsoever, without the consent in writing of the said Lord *Sidmouth*, his heirs or assigns, for that purpose first had and obtained, save and except to a wife, child or children, or to a partner or partners," or in case the lessee or lessees should be adjudged bankrupt, &c., it should be lawful for the said Viscount *Sidmouth*, his heirs or assigns, to re-enter upon the demised premises and take possession thereof, and also to work and win and get the mines and minerals thereby demised, and sell and convert the same to and for his, her, or their own use and benefit, and from thenceforth the term of forty years, and all right and interest thereby granted or demised, or intended

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so to be, and every clause, covenant, and agreement therein contained should cease, determine, and be absolutely void to all intents and purposes whatsoever except for the purpose of recovering arrears of rent and compensation for any breach of the covenants, provisions, or agreements therein contained. The lease also contained a covenant by *H. H. Williamson*, the lessee, not during the said term to set, let, or part with the possession of the said premises, except as aforesaid, without the license or consent of the said Viscount *Sidmouth*, his heirs or assigns, in writing.

H. H. Williamson died on the 3rd of December, 1867, and his will was proved in June, 1868, by *John Henshall Williamson*, his sole acting executor.

On the 17th of June, 1871, Lord *Sidmouth* granted to *J. H. Williamson* a license to underlet to *George Baddeley* certain parts of the property comprised in the lease, for any term of years short of the whole term created by the lease, but it was declared by the license that it should not authorize any further letting or assigning, or other parting with the possession of the lands thereby licensed to be sub-let, or any part thereof, without such consent as was required by the lease with respect to assigning and underletting of the lands thereby leased.

On the 21st of July, 1871, *J. H. Williamson*, after obtaining the consent of Lord *Sidmouth*, entered into an agreement with *George Baddeley*, by which he agreed to grant to him an underlease, which was to be in all respects similar to that granted by Lord *Sidmouth*, of a portion of the mines comprised in the lease from Lord *Sidmouth* to *H. H. Williamson*, for the term of twenty-nine and a half years from the 23rd of March, 1871, at the rents and royalties therein mentioned, with a proviso—

"That in such underlease shall be contained the like provisions, conditions, and stipulations, in all respects, as were contained in the said recited indenture of lease, except the covenant on the part of the lessee to leave a barrier between the mines thereby demised and the mines under the adjoining lands."

It was also provided by this agreement that the contract thereby entered into, and the underlease to be granted in pursuance thereof, should be subject to the consent of the Court of Chancery in

the suit of *Williamson* v. *Williamson* (a suit instituted by *J. H. Williamson* for administration of the estate of *H. H. Williamson*), and that *J. H. Williamson* should use his best endeavours to obtain such consent.

In March, 1872, *Baddeley* agreed to sell his interest in the mines to one *Anderson*, who, in November, 1872, entered into an agreement for the sale of his interest to the *Wedgwood Iron Company*, the license of Lord *Sidmouth* having been obtained by *Baddeley* for these assignments.

In pursuance of the agreement of the 21st of July, 1871, a draft underlease was prepared by the solicitors of *J. H. Williamson*, and forwarded for approval to the solicitors of *Baddeley*, by whom it was returned approved. In this draft lease the name of Lord *Sidmouth* (his heirs and assigns) was inserted in the proviso for re-entry and the covenant against assignment as the person whose consent in writing was required.

In July, 1872, the *Chatterley Iron Company* agreed to purchase all the interest of *J. H. Williamson* in the mines and premises, subject to the agreement for granting a lease to *Baddeley*. This contract was confirmed by an order in the suit dated the 2nd of August, 1872, and completed by a conveyance dated the 21st of May, 1873; both contract and conveyance being subject to the agreement with *Baddeley* of the 21st of July, 1871.

The draft of the proposed underlease was forwarded to the solicitors of the *Chatterley Iron Company*, by whom the clause relating to assignments and underlettings was altered, by making it necessary for *Baddeley* to obtain the consent in writing of the *Chatterley Iron Company* ("the lessors, their successors, or assigns") to any assignment or letting of the premises, and not that of Lord *Sidmouth*, as was provided by the draft underlease forwarded by *J. H. Williamson* to *Baddeley*.

Baddeley's solicitors objected to this alteration, and, on the other hand, the *Chatterley Iron Company* wrote that they "declined to be bound by the terms of a draft lease alleged to have been submitted by *Williamson* to and approved by Mr. *Baddeley*, without notice to them as purchasers after their purchase contract had been confirmed, and to which draft they were no parties."

After some further correspondence, a summons was taken out

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by the *Chatterley Company* to proceed upon the order by which the underlease was directed to be settled by the Judge in Chambers.

The summons had been adjourned into Court upon the question of the frame of the clause against assignment.

Mr. *Kay*, Q.C., Mr. *E. R. Cooke*, and Mr. *Whitehorne*, for *Baddeley*, contended that the name of Lord *Sidmouth*, and not that of the sub-lessors, as the person whose consent was necessary to any assignment or underletting, was alone to be inserted in the proviso. To make the consent of the sub-lessors necessary would be imposing an additional restriction which they were not entitled to require.

Mr. *Joshua Williams*, Q.C., and Mr. *Everitt*, appeared for the *Wedgwood Iron Company*, to whom, with Lord *Sidmouth's* consent, *Baddeley* had assigned his interest under the agreement with *J. H. Williamson*, but were not heard.

Mr. *Eddis*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Whitehead*, for the *Chatterley Iron Company*, contended that they were entitled to the same control over their sub-lessees as was given to Lord *Sidmouth* over his lessee by the original lease. Lord *Sidmouth* was not a party to this contract, and though it was not suggested in this particular case that he would collude with the sub-lessees against the sub-lessors, he might not have the same means as the sub-lessors of judging as to the advisability of any proposed assignment, and the insertion of their names, so as to give them the right of veto, was necessary to protect them against the risk of forfeiture. The meaning of the proviso for inserting the like provisions, &c., was that, as in the covenants for payment of rent, and other provisions, the names of the sub-lessors should be substituted for that of the original lessor, and this view was borne out by the practice of conveyancers, who, in settling underleases, made the consent of the sub-lessors necessary: *Jarman's* Bythewood (1); *Davidson's* Precedents (2).

Mr. *Chisholm Batten* appeared for the Plaintiff, *J. H. Williamson*, but took no part in the argument.

(1) Vol. iv. p. 573. (2) Vol. v. p. 176.

SIR JAMES BACON, V.C.:— V.-C. B.

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Nobody can have more respect than I have for the valuable assistance which is afforded to the profession generally by the precedents contained in Mr. *Jarman's* and Mr. *Davidson's* books. But what I have to carry out in this instance is a contract between parties; and it is impossible that any contract on the part of these lessors can make them usurp Lord *Sidmouth's* rights or take his place.

I can see no ground whatever for the contention which has been raised on their part. Lord *Sidmouth*, being the owner of this property, exercising a paramount right, leases to *Williamson*, and says: "You shall not assign or underlet to anybody without my consent." Then *Williamson* goes and asks somebody to take an underlease of part of the premises. How can that possibly deprive Lord *Sidmouth* of his power over the property, or give that power to anybody else?

Williamson, having got Lord *Sidmouth's* consent, agrees to give *Baddeley* an underlease upon the same terms as those upon which Lord *Sidmouth* had leased to him, one of which is that "you shall not underlet without my" (Lord *Sidmouth's*) "consent." Of course, then, the underlessee cannot assign or underlet without Lord *Sidmouth's* consent, and that he should be entitled to treat with a stranger, with the consent of *Williamson* only, would be inconsistent with the nature and genius of the transaction.

Then it is said that the underlessee, if he is bound by the contract to get Lord *Sidmouth's* consent, is bound also to get that of the company (*i.e.*, *Williamson*). But for that contention I can see no ground whatever. It would be adding a new term to the contract. It would be compelling the underlessee to get the company's consent, whereas all he had stipulated to do was to get Lord *Sidmouth's*. Thus, to insist upon the underlessee getting the company's consent would be not only beyond but contrary to the contract, because the only stipulation as to assignment into which the underlessee entered was, that Lord *Sidmouth's* consent should be obtained. Not only is there no stipulation for the consent of *Williamson* or his assigns to any transfer, but there is no necessity for it, because the whole property is bound and pro-

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tected by the stipulation that there shall be no underlease except that which Lord *Sidmouth* consents to.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Mr. *Worthington Evans* for Messrs. *Hand, Blakiston, & Everett, Stafford;* Messrs. *Wedlake & Letts.*

V.-C. B. 1874 *March* 7.

FINCH *v.* PESCOTT.

[1864 F. 116.]

Will—Administration—Interest allowed to Executor on Advances.

By the will of a trader, the residue of his real and personal estate, including his stock-in-trade and effects used therein and the goodwill of his business, was bequeathed to a trustee and executor, upon ordinary trusts for sale and conversion. The executor had from time to time out of his own moneys advanced various sums in excess of the balance in his hands.

The Court, in administration, allowed the executor £4 per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances.

FURTHER CONSIDERATION.

By the will, dated the 24th of August, 1861, of *William Pescott*, late of *Portsea*, railway carrier, who died on the 1st of April, 1862, seised and possessed of freehold, copyhold, and leasehold, and also of considerable personal estate, *Edwin Frost* and three other persons, being the widow and two nephews of the testator, the two latter being minors at his death, were appointed trustees and executors. After specific bequests of realty, the testator devised and bequeathed the residue of his real and personal estate, "including my stock-in-trade and effects used therein and the goodwill of my business as railway carrier," to the same four persons, upon trust that they or other the trustees or trustee for time being of that his will should as soon as conveniently might be after his decease (or at such time or times as they or he might think fit so to do), sell, call in, and convert into money such part thereof as should not consist of money, and stand possessed of the proceeds of such sale or sales, calling in, and conversion into money of his said residuary real and personal estate, and such part of his personal estate as should consist of money, upon trust to pay his debts, funeral and

testamentary expenses, and to stand possessed of the residue in trust for the persons in his will named.

The suit was instituted on the 19th of December, 1864, against *Frost* and the widow, who had proved the will, for administration. A decree was made on the 11th of February, 1865, and on the 7th of January, 1867, the widow died, having appointed *Frost* her sole executor. The Chief Clerk, on the 8th of August, 1873, certified that there was due to the estate of the widow and to *Frost* a balance of £1074 15*s.* 11*d.*, on account of the personal estate not specifically bequeathed; and that there was due to *Frost* alone on a similar account a balance of £205 13*s.*; that he had disallowed a retainer by *Frost* of a legacy of £50; and that *Frost* had from time to time out of his own moneys paid various sums in excess of the balances remaining in his hands, on account of the testator's personal estate not specifically bequeathed, on account of the testator's business carried on by *Frost*, and on account of the rents and profits of the real estates; and that the moneys so advanced by *Frost* were applied in payment of the debts of the testator and otherwise on account of his personal estate, and had been allowed to *Frost* in the personal estate account; also that *Frost* claimed to be allowed interest at £4 per cent. on the sums from time to time so advanced by him in excess of the balances; and that the question whether a sum of £416 2*s.* 9*d.*, representing such interest down to the date of the certificate, ought to be allowed to *Frost*, had been reserved for the Court.

This question now came on. The interest had been computed on balances appearing due to *Frost* at the end of every year, without including any interest in the computation of such balances.

Mr. *Woodroffe*, for the Plaintiffs:—

To allow £4 per cent. on advances made to pay debts which were only carrying £3 per cent., would be to mulct the estate in favour of the executor.

Mr. *Kay*, Q.C., and Mr. *T. A. Roberts*, for the Defendant *Frost*:—

Instances in which interest upon advances has been allowed are,

V.-C. B. 1874 FINCH v. PESCOTT.

Ex parte Chippendale (1); *Murray's Executors' Case* (2); *Sargood's Claim* (3).

SIR JAMES BACON, V.C.:—

I think the claim of the executor in this case is a reasonable one, and I allow him interest on his advances at £4 per cent.

Solicitors for the Plaintiffs: Messrs. *Robinson & Preston.*
Solicitors for the Defendant: Messrs. *Smith, Fawdon, & Low.*

V.-C. B. 1874 *March* 10.

LANCEFIELD *v.* IGGULDEN.

[1870 L. 116.]

Administration—Marshalling Assets—Specific Devise—Residuary Realty—Deficient Estate—Contribution.

In the administration of the estate of a testator whose personal assets are deficient, specifically devised estates are not liable to contribute towards meeting the deficiency until the residuary real estate has been exhausted.

FURTHER CONSIDERATION.

George Lancefield, by his will, dated the 24th of November, 1864, after various specific devises and legacies, directed his trustees to stand possessed of his freehold building yards and hereditaments in *Broad Street, Northgate, Canterbury*, and all his estate and interest in his stone, brick, and lime yards and business premises, in trust for the Plaintiff for the term of his natural life, and after his death upon certain trusts for the benefit of the Plaintiff's children. The testator also directed that, subject and without prejudice to the life estate of his mother therein, the trustees should stand possessed of his messuage and premises and land at *Wingmore*, in *Kent*, in trust for the Plaintiff, his heirs and assigns, for ever. And subject to the life estate of his mother in the residue of his freehold and leasehold messuages, lands, and hereditaments, the trustees of the will were directed to stand possessed of the residue of, and all his

(1) 4 D. M. & G. 19, 43, 54. (2) 5 D. M. & G. 746, 753.
(3) Law Rep. 15 Eq. 43.

estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments, in trust for his sister *Eliza Lancefield*, her heirs, executors, administrators, and assigns; and as to all the residue of his personal estates and effects not thereinbefore disposed of, subject to the payment thereout of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto *Eliza Lancefield* absolutely.

The testator died on the 17th of February, 1868.

The Plaintiff, who was a specific devisee under the will (as already stated), claimed also to be a creditor of the testator for a sum of £400, for work and labour, and for bricks and materials supplied, and filed this bill for an account and payment of what was due to the Plaintiff and all other creditors of the testator, and for administration of testator's real and personal estate.

The personal estate was insufficient for payment of debts, and the bill alleged that the Defendants had sold a portion of the property specifically devised for the benefit of the Plaintiff and his children, and applied the proceeds in payment of the testator's debts.

Accounts and inquiries were directed by the decree made at the hearing, including an inquiry what real estate the testator was seised of or entitled to at the time of his death, distinguishing such parts as were given or devised by name from those parts which the testator directed his trustees to stand possessed of, as "the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments."

The Plaintiff had carried in his claim as a creditor of the testator for £401 14*s.* 8*d.*, but the claim (with the exception of £24 12*s.* 8*d.*) was disallowed by the Chief Clerk, and a balance found due from him to the estate upon investigation of a counterclaim by the executors of £62 6*s.* 4*d.*

The case now came on upon further consideration, the two questions being, 1, whether the specifically devised estates were liable to contribute rateably with the residuary real estate to meet the deficiency of personal estate; 2, the costs of the Plaintiff's claim as a creditor which had failed.

Mr. *Kay*, Q.C., and Mr. *G. W. Collins*, for the Plaintiff, contended that the deficiency of the personal estate must be made

V.-C. B. 1874 LANCEFIELD v. IGGULDEN.

good out of the residuary real estate before resorting to the estates specifically devised, which from the nature of the gift were intended to be taken without the burthen of the debts: *Tombs* v. *Roch* (1).

Mr. *Miller*, Q.C., and Mr. *Ince*, for the Defendants:—

Before the *Wills Act* (1 Vict. c. 26) every gift of real estate, whether in terms specific or residuary, was in fact specific; and since that Act, although there has been some difference of opinion, it is now settled that every devise of real estate, though in terms residuary, is in fact specific; and that the specifically devised estates are liable to contribute *pari passu* with the estate included in the residuary devise to the payment of debts for which the personal estate is deficient: *Eddels* v. *Johnson* (2); and although a different opinion was expressed by Vice-Chancellor *Kindersley* in *Dady* v. *Hartridge* (3), that opinion has not been followed: *Pearmain* v. *Twiss* (4); *Clark* v. *Clark* (5); *Hensman* v. *Fryer* (6); *Gibbins* v. *Eyden* (7). It will be said that the decision in *Hensman* v. *Fryer* was mistaken, and has not been followed: *Collins* v. *Lewis* (8); *Dugdale* v. *Dugdale* (9); but the only part of Lord *Chelmsford's* decision which was questioned was the direction that the specific devisees should contribute rateably with the pecuniary legatee, and not the part on which we rely, that a residuary devise of real estate remains specific notwithstanding sect. 24 of the *Wills Act*.

Upon the question of costs, the Plaintiff ought not, from filling the position of devisee as well as that of creditor whose claim has failed, to be in any better position than any outside creditor coming in to prove, and liable to pay the costs of a claim which is disallowed.

Mr. *Kay*, in reply:—

Dady v. *Hartridge* and *Brownson* v. *Lawrance* (10) are distinct

(1) 2 Coll. 490.
(2) 1 Giff. 22.
(3) 1 Dr. & Sm. 236.
(4) 2 Giff. 130.
(5) 34 L. J. (Ch.) 477
(6) Law Rep. 3 Ch. 420.
(7) Ibid. 7 Eq. 371.
(8) Ibid. 8 Eq. 708.
(9) Ibid. 14 Eq. 234.
(10) Ibid. 6 Eq. 1.

authorities that real estate included in a general residuary gift is liable for payment of debts before real estate included in a specific devise. In *Collins* v. *Lewis* (1) Vice-Chancellor *Stuart* said: "The decision in the case of *Hensman* v. *Fryer* is clearly a mistaken decision; and I must therefore decline to follow it." And in *Dugdale* v. *Dugdale* (2) Vice-Chancellor *Malins* says: "The point as to marshalling the deficiency between the legacy and the real estate was decided in *Hensman* v. *Fryer* under a misapprehension as to the effect of the decision in *Tombs* v. *Roch* (3), and I must refuse to follow it. The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous."

We do not deny that personal estate is liable before real estate for payment of debts, but a residuary devise being a sort of drag-net to sweep in everything that is left undisposed of, there is no such particular intention in favour of the residuary devisee as there is in favour of the specific devisee.

Mr. *Miller*:—The decision in *Brownson* v. *Lawrance* (4), that a specific devise of part of a mortgaged estate, the other part being left to pass by the general residuary gift, is of itself an expression of intention that the part which passes by the residuary gift shall be primarily liable to payment of the whole of the mortgage debt in exoneration of the part specifically devised, has been questioned, and was not treated as a binding authority in *Gibbins* v. *Eyden* (5); *Sackville* v. *Smyth* (6).

Sir James Bacon, V.C.:—

The case of *Tombs* v. *Roch*, according to my notion, states the real rule according to which a testator must be considered to desire the fulfilment of all the provisions of his will according to their apparent purport, and that a specific devise expresses an intention on his part that the particular devisee should enjoy the specified individual portion of the property which has been devised to him. No principle of justice demands, nor is there any countenance given by the cases to the proposition, that specific devisees

(1) Law Rep. 8 Eq. 708.
(2) Ibid. 14 Eq. 234.
(3) 2 Coll. 490.
(4) Law Rep. 6 Eq. 1.
(5) Ibid. 7 Eq. 371.
(6) *Ante*, p. 153.

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shall contribute *pari passu* with residuary devisees to the payment of debts.

When the personal estate has been exhausted the residuary real estate is bound to contribute towards payment of the testator's debts, and it is not until the residuary real estate has proved insufficient that the specifically devised estates become liable. The distribution must take effect on this principle. As to the costs, it would not be just to make the Plaintiff pay any, but he will not have any in respect of his claim as a creditor.

Solicitors: Messrs. *Monckton, Long, & Co.*; Mr. *J. Henry Jones.*

TURNER *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

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Jan. 20, 21;
Feb. 17.

[1872 T. 81.]

Railway Company—Private Right to stop Train—Ordinary Trains—Death of Plaintiff before Judgment—Nunc pro tunc—Practice.

Where a Branch Railway Act gave a landowner the right to stop by signal all ordinary trains:—

Held, that accelerated trains forming part of fast through trains from *London*, were not "ordinary" trains, though the fares charged were at the ordinary rate.

Where an Act confers upon a landowner a private right creating a burden upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly.

Where a Plaintiff dies after hearing but before judgment the Court has jurisdiction to date the judgment as of the date of the hearing.

IN 1859, by the *Ringwood, Christchurch, and Bournemouth Railway Act*, a company was incorporated, and authorized to construct a railway from a point on the *South-Western* line, in the parish of *Ringwood*, to *Christchurch*, passing through lands belonging to Lord *Malmesbury*, near *Avon Cottage*. The 27th section was as follows:

"That the company shall erect and for ever maintain a lodge at the point where the railway will cross the occupation road numbered 29 on the plans deposited for the purposes of this Act in the parish of *Ringwood*, being the northern entrance to *Avon Cottage*, and the owner or occupier for the time being of *Avon Cottage* shall at all times have the right of exhibiting at that lodge a road signal, being a red flag by day and a red lamp at night, for the purpose of stopping any "ordinary" train to set down or take up passengers; and whenever such signal shall be visible in reasonable time for the purpose, the company shall cause any such ordinary trains to stop at such point, and shall take up and set down passengers accordingly."

The 40th section provided that the tolls charged upon the line should not exceed per mile $2\frac{1}{2}d.$ for each first-class passenger, $1\frac{3}{4}d.$ for each second-class, and $1d.$ for each third-class passenger.

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The 42nd section was as follows:—"The restriction as to the charges to be made shall not extend to any special train that may be required to run upon the railway, but shall apply only to the ordinary and express trains appointed from time to time by the company for the conveyance of passengers and goods upon the railway."

The 45th section was briefly as follows:—"The *South-Western Company* from time to time may make all such contracts and arrangements as they think fit with respect to the user and working of the railway, or any part thereof, by the *South-Western*, and such working contracts and arrangements respectively may be upon such terms and conditions whatsoever with respect to the providing by that company of engines and carriages, plant, stock, and servants for such working of the railway or any part thereof, and with respect to the conduct and regulation of the traffic on the railway or any part thereof respectively, and with respect to the fixing, collection, division, apportionment, and application of the tolls, rates, and charges to be demanded and taken for such traffic or any part thereof, and with respect to the compensation to be made by either of the companies (the *South-Western* and the *Ringwood, Christchurch, and Bournemouth*) to the other of them, for such purposes or any of them; and with respect to any other matter in connection with such working as those two companies shall mutually agree on."

The railway was accordingly constructed, and the land, twenty-two acres, purchased for £498 16*s.* 6*d.*, and the railway opened for traffic. From the opening in March, 1870, the line was worked by the *South-Western Railway Company*, under agreements.

On the 25th of June, 1863, the grandfather of the Plaintiff purchased *Avon Cottage* and the adjacent land from Lord *Malmesbury* for £14,300, and his interest was now represented by the Plaintiff.

By the *Ringwood, Christchurch, and Bournemouth Railway Extension Act*, the company were authorized to extend the line to a point in the parish of *Holdenhurst*, which, by sect. 19, was to be deemed a part of the undertaking. By sect. 20, the provisions in the *Ringwood Act*, from 45 to 49 inclusive, as to the working, were to extend to the extension. By an agreement dated the 10th of

February, 1870, between the companies, a perpetual lease of the line was to be made to the *South-Western*, but all past liabilities were to remain in force.

Up to March, 1872, the Plaintiff exercised his right as to the trains running both ways upon the line, but in that month the *South-Western Railway Company* added a down train which left *Ringwood Junction* at 6.16 P.M., subsequently altered to 5 P.M., and which reached *Bournemouth* at 6.44 P.M., and subsequently at 5.30 P.M. They also added an up-train appointed to leave *Bournemouth* at 10.10 A.M., subsequently altered to 10.15 A.M., and again altered to 11.5 A.M., which was appointed to reach *Christchurch* at 10.18 A.M., subsequently to 10.23 A.M., and afterwards to 11.14 A.M., and to reach *Ringwood Junction* at 10.38, subsequently altered to 10.42 and 11.33. These trains the Defendants, the *South-Western Railway Company*, refused to allow to be stopped, on the ground that they were not "ordinary" trains within the meaning of the 27th section of the Act. A correspondence ensued between the solicitors of the Plaintiff and the company, which resulted in nothing; and the Plaintiff on the 30th of August, 1872, filed this bill, which prayed for a declaration that the Plaintiff was entitled to stop by signal, in the mode prescribed by the 27th section of the Act, these said trains, and for an injunction to restrain the company from refusing to stop these trains as agreed on. In their answer the company alleged that they had directed their manager, Mr. *Scott*, to organize a fast train daily between *Bishopstoke* and *Bournemouth* from the 1st of March, 1872, and in the summer a fast train between *Weymouth* and *Dorchester;* that in pursuance of these directions, Mr. *Scott* arranged these trains which occupied about twenty minutes less between *Bishopstoke* and *Ringwood Junction*, and seven minutes less between *Ringwood Junction* and *Bournemouth* than the quickest ordinary train between those places; that subsequently to March, 1872, it was found necessary, in order to suit the traffic arrangements, to make alterations in the times of the trains, whereby the up fast train from *Bournemouth* was further quickened by five minutes; that the trains with their engines and carriages ran direct through to and from *Bishopstoke* and *Bournemouth*, and were in connection "with the fast or express trains between *Bishopstoke* and *London*." The

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company in their answer further stated that the Plaintiff had the full benefit of the same number of ordinary trains as he always had previously to the running of the said express trains. That the said fast trains differed from ordinary trains in this respect, that horses and carriages were not conveyed by them, and that they ran through the whole distance with the same engines and carriages, which ordinary trains did not. The company further alleged that the fares charged were the maximum. They also alleged that to stop the train as the Plaintiff sought to compel them to do would practically render it impossible to run any express trains along the line.

Mr. *Dickinson*, Q.C., and *F. O. Haynes*, for the Plaintiff:—

It is admitted that the Plaintiff, as the owner of *Avon Cottage*, is entitled to stop all ordinary trains at the *Lodge* by signal, and until 1872 the right has been exercised, but the Defendants now contend that the trains in question are not ordinary trains within the meaning of the Act; but if not ordinary trains what are they? Certainly not special trains, which words have a definite and well-understood signification. Neither are they express trains, which also have a well-defined meaning and a characteristic also well known—that higher fares are charged for them. The trains in question wanted this characteristic, for the fares charged for them were at the ordinary rate. Then the Defendants relied on the title given to these trains; but that is a matter of indifference, even were the argument well founded in fact. But in the time tables many of the trains described under the headings as fast trains were really ordinary trains. In the tables for March, 1872, the trains in question were described in one of the two columns, in which the words, "*Southampton*, *Stokes Bay*, *Bishopstoke*, and *Weymouth* Fast Trains" occur exactly as they were in the tables for the previous month. But even were it otherwise, what the Court must look at is whether these trains differ in fact from the ordinary trains of the company, and not at the name which the Defendants were pleased to give them. The 40th and 41st sections mention special trains and express trains, and if these additional trains are neither, which they certainly are not, they must be ordinary trains.

Mr. *Greene*, Q.C., and Mr. *Everitt*, for the Defendants:—

The Plaintiff has all the accommodation he has ever had on the railway. It is he, therefore, that is demanding more, and not the company affording less.

In March, 1872, the company, in consequence of a requisition made to them, placed these additional trains on the line so as to effect a saving over the short line of about five minutes one way, and four the other. These trains were put on for the purpose of affording a special service between *Ringwood* and *Bournemouth*, and *vice versâ*, in connection with fast and express trains of the main line service of the *London and South-Western Railway Company* between *Bishopstoke* and *London*, whereby a considerable saving was effected, not merely in the journey between *Bournemouth* and *Ringwood*, and *vice versâ*, but in the journey between *London* and *Bournemouth*, and *vice versâ*. It is quite clear, therefore, they are not "ordinary trains," but trains introduced for a special object. It is quite immaterial how they were entitled or at what rate of charge the fares were issued. As a matter of fact all the fares charged on the *South-Western Railway* are at a maximum rate.

The Vice-Chancellor reserved his judgment, but before it was delivered the Plaintiff died, and the case stood over till the 17th of February, when the Vice-Chancellor delivered judgment.

SIR CHARLES HALL, V.C.:—

The Plaintiff having died since the conclusion of the argument I desire, before proceeding to deliver judgment, to state that it appears to me, upon consideration and an examination into authorities, as far as I have been able to find any, and with the valuable aid that I have received from the Registrars, who have inquired into the matter, and also from the search made by Mr. *Cecil Russell*, who has been good enough to search the register, that I am able to deliver judgment, and to direct that the judgment shall be entered as of the date when the argument concluded upon the case. As the point is one of some general importance I may observe that the cases which have led me to this conclusion are *Collinson* v. *Lister* (1), and *Troup* v. *Troup* (2).

(1) 20 Beav. 355. (2) 16 W. R. 573.

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In *Collinson* v. *Lister* (1) the suit became abated between the hearing and the delivery of the judgment. Mr. *Prior* suggested that under such circumstances the decree could not be drawn up, it having been made pending the abatement. The Master of the Rolls said, "I am satisfied that this presents no difficulty. The point is settled by *Cumber* v. *Wane* (2), where other cases are referred to in a note." As reported there, all that bears on the present question is this passage: "There it was alleged that since the time which the Court took to advise, the Defendant in error was dead; and therefore they prayed that they might enter the judgment *nunc pro tunc*, as was done in the case of *Baller* v. *Delander* (3), which was ordered accordingly."

In *Chitty's Archbold's* Practice, Queen's Bench (4), the rule at law is stated thus: "The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court. Therefore, if a party die after a special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the death *nunc pro tunc* in order that a party may not be prejudiced by a delay arising from the act of the Court." Then it goes on to explain that the Court will not do it where the act arises from the neglect of the party himself in completing the judgment. I need not refer to that. In support of this general statement of the law several cases are referred to, some of them of comparatively modern date. The rule at law is that judgment in certain cases may be entered *nunc pro tunc*, whatever that may mean.

What is stated in *Troup* v. *Troup* (5) is as follows: "The case came before the Lord Chancellor on appeal, and was elaborately argued for several days. The arguments were concluded on the 30th of April, 1867, but judgment was reserved. On the 2nd of November the Lord Chancellor gave judgment *nunc pro tunc*, so that the

(1) 20 Beav. 355.
(2) 1 Str. 426.
(3) Trin. 1 Geo. in B. R.; not reported apparently.
(4) 10th Ed. by *Prentice*, 1858, p. 1502; 12th Ed. p. 1572.
(5) 16 W. R. 573.

order bore date the 30th of April, by which the bill was dismissed against Messrs. *Moreing & Holgate* with costs, to be taxed by the Taxing Master." So that it is expressly stated there that the order was dated on the day on which the argument was concluded. That is what is meant there by *nunc pro tunc*.

There are some other cases in which the judgments have been entered *nunc pro tunc* in this Court, but, as far as I can make them out, they are not very satisfactory authorities upon the point, because I do not make out that the judgments were actually antedated, and, therefore, *nunc pro tunc* in this Court does not seem always to have been considered as equivalent to, or the same thing as, antedated, and that is what I felt some difficulty about. There has been a practice in this Court, which dates from a very early period indeed, of requiring that all judgments, decrees, and orders should be entered within certain times—generally twelve months. There is a very old order (1) to that effect, which, however, is not in the General Orders, but has, nevertheless, been acted upon, as I collect, since those orders; and the practice has been to obtain in those cases where the decree or order has not been entered within twelve months, an order of course authorizing the entering up, as they call it, *nunc pro tunc*. The practice apparently is this: The books in which decrees and orders are entered are sent away every twelve months from the ordinary office, where they would be entered, and go into other custody, and getting into other custody you have to go to somebody else to get the books to make the entry. Under the order of course you get the books back again and then make the entry. There you enter it *nunc pro tunc*, but so entering it, it is not antedated, so far as I collect, and, therefore, the entry *nunc pro tunc* in this Court is an am-

(1) The following note upon this point was furnished by the Registrar.

4 Dec. 1691.

Beam. p. 290, Reg. Lib. A. 1691, fo. 165 :—

"All Orders, Rules, and Process of Michaelmas and Hilary Terms or Vacations to be entered before the following Michaelmas Term. And those of Easter and Trinity Terms and Vacations before the following Easter Term, and not to be entered without a special Order of the Court."

The Order to enter *nunc pro tunc* is obtained from the Secretary's office at the Rolls. The Order directed to be entered is placed in the old book under date, thus an Order dated in 1869 would be entered in lib. 1869 with a note in the margin.

"Entered p. Order, dated day of

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biguous expression. In *Troup* v. *Troup* the order was actually antedated; there is no doubt about that fact. As to *Collinson* v. *Lister*, I have been furnished with an extract from the Registrar's book of the day. Mr. *Wood* was the Registrar, a very experienced officer, and he seems to have made an express note in his book that the decree was to be dated on the 15th of February, 1855 (1). Again, there is in the margin: "*N.B.*—The decree to be dated that day, although the judgment given on this, a party having died in the intermediate time." Therefore this matter was manifestly considered by the Court and determined deliberately. In the other cases the orders may have been made *nunc pro tunc* without defining exactly what that meant. But there being those two authorities on the subject, and, as far as I can collect, the practice at common law having been such as I have stated, although I have not got the records to see that the orders were

The Master of the Rolls at the Rolls.

(1) Copy entry in Mr. Registrar *Woods'* Minute Book for Easter Term, 1855, p. 18.

Thursday, the 19th of April, 1855.

Collinson v. *Lister*.

Judgment. Cause heard on the 15th day of February, 1855.

Mr. *Bedwell's* book.

Decree to be dated 15 Feb, 1855, see Mr. *Bedwell's* book of that day, when cause finally heard.

N.B.—The decree to be dated that day, although judgment given on this, a party having died in the intermediate time.

Drawn 25/4/55.

Mr. *Roupell* for Plaintiff.

Mr. *Follett*, and Mr. *Robson*, for *Francis Lister*.

for Defendants, the company.

Passed 10/5/55.

Mr. *R. Palmer*, and Mr. *Prior*, for the Defendants, *James Meek*, *Thomas Price*, and *Robert Williamson*.

Mr. *Amphlett*, for Plaintiff.

The Plaintiff having died since the cause was heard, the decree to be dated the day on which the cause was heard, viz., 22 Feb.

Probate of the will *Hannah Hardesty* granted to *Francis Lister* 25th of June, 1851.

Cur. decree for the usual accounts and inquiries as to the personal estate.

No allowance to be made to the Defendant *Lister*, the executor, for the advance of £300 and £1300 made by him.

See *Cumber* v. *Wane* (*Smith's* Leading Cas. vol. i. pp. 301–314, 2nd ed.)

The testatrix's estate not liable to the payment of either of those two sums.

Judgment entered *nunc pro tunc*.

Let the Defendants, the banking company, on the last seal after Trinity Term, pay into the bank to the credit of this cause the sum of £1100, with interest, at the rate of £4 per cent. from the time of receipt to the time of payment into Court.

This afterward directed by the Court to be omitted.

The Defendants, the company, to pay the Plaintiff's costs up to this time. The subsequent costs to abide the usual course of costs in administration suits Reserve further consideration.

antedated in those cases, still I do not apprehend, or have any reason to know, that there are any such rules as I have referred to as existing in the Court of Chancery of entering *nunc pro tunc* in certain cases; and seeing the reason given in books of practice for the rule, it seems to me it must be the practice at law in some way or other to effect that object by making those orders, whether they actually antedated them, or whether they considered them when entered as *nunc pro tunc* in some particular form as equivalent to it, is unimportant. Suffice it to say that the object is to put the party on the one side or the other, Plaintiff or Defendant, exactly in the same position as if judgment had not been delayed by the Court. Therefore I shall order this judgment to be entered as of the day when the argument terminated, and that will avoid all difficulty. I may add that upon consideration I cannot think that any injustice can accrue to anybody else in doing that, either as between different judgment creditors or persons having the benefit of judgments in the present state of the law. Perhaps formerly there might have been a difference, but I do not apprehend there can now be any difference, because although the judgment will be antedated, of course you cannot have the benefit of a registered judgment until it is actually registered. Therefore there is apparently no benefit or loss to accrue to any body by the course being taken of antedating the judgment. I will now proceed to give judgment upon the case (1).

(1) The following note was furnished by the Registrar, Mr. *Rogers*:—

Cases of abatement between hearing and judgment.

In *Cumber* v. *Wane* (1 Str. 426), judgment entered *nunc pro tunc* where Defendant died during a *cur. adv. vult.*

In *Davies* v. *Davies* (9 Ves. 461), *held* by Lord *Eldon*, on the 21st of March, 1804, that death of one of the Defendants does not necessarily prevent judgment. The cause was heard (see Reg. Lib. 1803, A. 668), on the 26th of July, 1802, judgment given on the 12th of May, 1804; which was date of decree.

In *Belsham* v. *Percival* (8 Hare, 157), where the hearing was completed on the 24th of June, 1847, it was held by Vice-Chancellor *Knight Bruce*, that the death of a Defendant in the interval between the hearing of the cause and the judgment does not render a bill of revivor necessary prior to drawing up the decree. Under the peculiar circumstances of this case a separate decree dismissing the bill against the Defendant was directed to be drawn up, and on referring to the entry in the Reg. Lib. 1846, A. 2355, it appears that the decree is dated the 4th of November, 1847, and expressed to be made by Vice-Chancellor *Wigram*, and entitled *Belsham* v. *Harrison*, and was

V.-C. H. 1874

TURNER v. LONDON AND SOUTH-WESTERN RAILWAY CO.

By the *Ringwood, Christchurch, and Bournemouth Railway Act*, 1859, the company were empowered to construct a railway from *Ringwood* to *Bournemouth*, the railway to join the *London and South-Western Railway* at *Ringwood*. The 27th section of the Act was as follows:—[The Vice-Chancellor read the section given above.] The only other sections necessary for me particularly to refer to are the 40th and 42nd. [The Vice-Chancellor also read these sections, given above.] The Act, sect. 45, provided for the line being worked by the *London and South-Western Railway Company*, if the two companies should come to an agreement for that purpose, which they did accordingly. The railway has always been worked by the *South-Western Company* in connection with the main line.

The Plaintiff is the owner and occupier of *Avon Cottage*, and as such is entitled to the benefit of the 27th section of the Act, and the question raised and to be determined in this suit is, whether certain additional trains which commenced running on the branch line in March, 1873, are or are not ordinary trains within the meaning of that section.

The branch line is about twelve miles in length, and has two stations between *Ringwood* and *Bournemouth*, viz. *Herne* and *Christchurch*. From the time of the opening of the line in March,

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entered *nunc pro tunc* by order dated the 28th of February, 1851.

In *Collinson* v. *Lister* (20 Beav. 355) the Master of the Rolls (*Romilly*) held that an abatement after hearing does not prevent judgment being delivered or the decree being drawn up, and His Honour expressed his opinion that the point is settled by the case of *Cumber* v. *Wane* (1 Str. 426). On referring to the entry in the Registrar's minute book of Registrar *Wood*, of the 19th of April, 1855, p. 17, where the case was mentioned, it appears that the abatement was caused by the death of the Plaintiff, and the decree was directed to bear date the day on which the cause was heard, and *Cumber* v. *Wane* (*Smith's* L. C. vol i. p. 301–314) is referred to, and on referring to the entry of the order in Reg. Lib. 154, A. p. 791, it appears that the decree which directed accounts to be taken and payment by the Defendant to the Plaintiff of his costs of suit up to decree, is dated the 15th of February, 1855.

In *Preston* v. *Merry* (M. R. 20th November, 1839, B. 341), it is stated in *Seton*, p. 1139, that the suit abated between the hearing and the judgment, and on referring to the entry of the order it appears that the decree is dated the 20th of November, 1839, being the day judgment was given. Cause stated to have been heard on the 27th and 28th of February, and the 1st, 2nd, and 4th March, 1839.

1870, until March, 1873, there were six trains a day from *Ringwood* to *Bournemouth*, and five trains a day from *Bournemouth* to *Ringwood*. In the time tables of the *London and South-Western Railway Company* for February, 1872, page 10, two of these trains are mentioned as being "*Southampton, Stokes Bay, Bournemouth*, and *Weymouth* Fast Trains." All these trains have been treated as ordinary trains coming within the 27th section, and the Plaintiff has accordingly had as to them the benefit of that section.

In March, 1872, the *London and South-Western Railway Company* added two additional trains each way; one of these trains was a train leaving *Ringwood Junction* at 6.16 P.M., reaching *Bournemouth* at 6.44 P.M., afterwards changed to 5 P.M. and 5.30 P.M. The other of these trains was a train leaving *Bournemouth* at 10.10 A.M. and arriving at *Ringwood* at or shortly before 10.38 A.M. The time of starting of this train was subsequently altered to 10.15 A.M. and afterwards to 11.5 A.M. and the time of arrival to 10.42 A.M. afterwards to 11.33 A.M. These two trains are the trains as to which the controversy has arisen. These trains do not run from *Ringwood* to *Bournemouth*, and from *Bournemouth* to *Ringwood* without stopping. They do stop at *Christchurch*, but they do not stop at *Herne*. They go quicker than the other trains above-mentioned, there being a saving of about five minutes one way and four minutes the other way; not an inconsiderable shortening of the time taken by the other trains, such time not much exceeding half an hour. The Defendants say that they have not considered and do not consider these trains as being ordinary trains. They say, and Mr. *Scott* the traffic manager of the *London and South-Western Railway Company* proves, that they were added in compliance with memorials addressed to the board of directors of the company requesting them to supply a special and express service between *Ringwood* and *Bournemouth*, and *Bournemouth* and *Ringwood*, running in connection with fast and express trains of the main line service of the *London and South-Western Railway Company* between *Bishopstoke* and *London*, and that there is a considerable saving of time by reason of the addition of the trains in question, not merely in the journey between *Bournemouth* and *Ringwood* and *vice versâ*, but in the journey from and to *London*, and to and from *Bournemouth*. Upon this state of facts, the question

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being, are those two trains ordinary trains, the answer, if given by a person not a lawyer, would, I cannot doubt, be, "they are not." The answer, if expanded, would, I think, be something to this effect: The trains in question are trains having a special object and purpose, and are not trains for the ordinary traffic and purposes of the branch line, and are not what are commonly or properly understood to be ordinary trains, particularly considering that they are substantially faster than the other trains; that they only stop at one of the two stations; that they have been put on to meet and be in connection with fast trains on the main line, and that they materially shorten the through journeys. The same answer must, I think, be my answer if the case be considered in reference to the application to this question of the 27th section of the Act. Unless indeed there be anything in other parts of the Act, or for any other reasons which can properly be had regard to, the words "ordinary trains" in that section should receive an interpretation in aid of the construction, that the trains are ordinary trains. The Plaintiff's counsel referred to and minutely examined the company's time-tables, pointing out that trains described in the headings, or in other parts of the tables as "fast trains," were ordinary trains; that the heading of the tables mentions express trains and fast trains; and particularly relied on this, that in the time-table for March, 1872, the additional trains are introduced in one of the two columns in which the words "*Southampton, Stokes Bay, Bishopstoke,* and *Weymouth* Fast Train" occur; and the Plaintiff's counsel contended that the mere insertion in that table of a new description of the additional trains shews that they are the same description of trains as those which the Plaintiff has been treated as entitled to the benefit of. I do not think the March time-table can be treated as containing either description or admission on the Defendants' part that the additional trains were and are ordinary trains. There would be a difficulty in framing the table so as to contain an accurate description of the character of the trains, and particularly so in making the descriptions throughout the whole journey of each train accurate; and I may observe that the words, "*Southampton, Stokes Bay, Bournemouth,* and *Weymouth* Fast Train," were not inaccurate as applied to the new trains, although those trains were faster than the trains to which

they were previously, and, indeed, still remained applicable, they referring to and comprising as well original trains as the additional trains. The heading "Express Train," had reference, and I think only a reference, to a particular train running in competition with an express train to the west of *England* on the *Great Western Railway*. Reference was also made by the Plaintiff's counsel to the table of fares, which only mention express and ordinary, but when it is considered that the company could and do charge the maximum authorized by their Act for passengers by all trains, excepting trains running in competition with the *Great Western Railway* express train, I do not think this table affects the construction of the 27th section.

I have now to consider the 40th and 42nd sections of the Act. It has been contended for the Plaintiff that these sections only mention special trains, ordinary trains, and express trains; that they must have been meant to provide for and embrace every description of train; that the two additional trains are neither special nor express trains, and therefore that they must be ordinary trains. It appears to me unnecessary to determine whether the two trains do or do not come under the description of express trains, as mentioned in the 42nd section, for, assuming that they do not, I do not think that they necessarily are ordinary trains, as there mentioned; or that if they are, that they must therefore be ordinary trains within the meaning of the 27th section. The 40th section prescribes the maximum of charge for passengers, which the 42nd section says is to apply only to ordinary and express trains, and not to special trains. If there be read into the 40th section of the Act, after the word passengers, the words, "by ordinary and express trains," not including passengers by special trains, it might be open to contend that sect. 40 left some passengers unprovided for. I do not express an opinion as to this, or even say that such reading of the 40th section as I have mentioned is the correct one; but I have said what I have said as shewing, or tending to shew, that it is, as I think, unsafe to rely upon the argument addressed to me founded upon sects. 40 and 42. Independently of this, I think it might well be held that a particular train was an ordinary train for the purpose of the 42nd section, that section being meant to comprise all trains, but not an ordinary train for the purpose of the 27th

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section, that section conferring a special and private right creating a burden upon a public highway, and restraining the ordinary rights of the directors and managers of such highway to regulate the trains and traffic so as best to accommodate the public. I think the 27th section should not be construed to embrace any train not coming clearly within its terms, and that such section should be interpreted in conformity with what I consider to be the proper and natural meaning of the words used, there not being, as I consider, clear words rendering another construction necessary.

I have not observed upon the mode in which the Defendants have described the trains in question since the dispute has arisen. The Defendants could not, by giving the trains names excluding them in terms from being ordinary trains, make them not ordinary trains if they were so in fact. Nevertheless, it was not incorrect for the Defendants to give them names so excluding them if such names were in fact accurate descriptions. However, I decide this case as I think it should be decided, upon the construction of the Act as applied to the actual facts and circumstances of the case, without taking into account what has been done since the dispute arose. On the whole, my opinion is, that the Plaintiff has failed to establish his case, and that his bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Leman, Groves, & Leman.*
Solicitor for the Defendants: Mr. *Crombie.*

Ex parte JACOBS. *In re* CARTER.

C. J. B.
1874
March 2.

Practice—Proof of Debt—Secured Creditor—Production of Security—Bill of Exchange—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-s.* 2, *s.* 78—*Bankruptcy Rules*, 1870, *rr.* 67, 72, 134—*Forms of* 1870, *No.* 32.

A creditor who holds a bill of exchange as security cannot prove his debt at the first meeting of creditors without producing the bill.

THIS was an appeal from a decision of the Judge of the *Birmingham* County Court.

Robert Carter, a gold chain maker at *Birmingham*, was adjudicated a bankrupt. The first meeting of the creditors was held on the 19th of January, 1874, the Registrar of the Court being the chairman. Among the proofs tendered at this meeting was one on behalf of the *Worcester City and County Banking Company, Limited*. The affidavit for proof was made by the manager of the company, and it stated that *Carter* was indebted to the company in the sum of £2031 16*s.* 7*d.*, for and in consideration of money lent and advanced to him by the company, and for interest, commission, discount, and other bankers' charges. The affidavit further stated that the company had no security for the debt except the bills of exchange and promissory notes specified in the schedule, and a mortgage upon a leasehold house, which the company assessed at the value of £750. The schedule specified the bills and promissory notes in the way prescribed by the form No. 32 of the Bankruptcy Forms of 1870. This proof was objected to by the representative of some of the other creditors, on the ground that the bills and notes were not produced. The chairman overruled the objection. The objecting creditors appealed to the Judge. He affirmed the chairman's ruling, and ordered the proof to be admitted. The objecting creditors appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants:—

The practice under the former Bankruptcy Acts was always that a creditor, who held a bill of exchange as security, could not prove his debt without producing the bill. So it is stated in all the text

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books: *Cooke's* Bankrupt Laws (1); *Archbold's* Law and Practice in Bankruptcy (2); *Griffith & Holmes'* Bankruptcy (3); *Ex parte Hossack* (4); *Ex parte Petrie* (5). Suppose the bank had parted with the bills, and the real holder of them now came to prove, what answer would the proof of the bank be to him? [They were stopped by the Court.]

Mr. *Roxburgh*, Q.C., and Mr. *Horton Smith*, for the bank:—

The form of "affidavit for proof of debt with or without security" (No. 32 of the Bankruptcy Forms of 1870) requires the particulars of the security to be set out, or if bills are held they are to be specified in the schedule. Nothing is said about production of the security. This form differs from the form No. 55 under the *Bankruptcy Act*, 1861, in this respect, that to the form No. 55 is appended a form of memorandum to be made upon the security by the Commissioner before whom the affidavit is sworn. This is omitted from form 32 under the Act of 1869. According to sect. 16, sub-sect. 2, of the Act of 1869, a creditor cannot vote at the first meeting, unless at or previously to the meeting he has "in the prescribed manner" proved his debt. The way in which the proof is to be made is prescribed by Rule 67 (6). Was it intended that valuable securities should be sent through the post, at the risk of their being lost? Then Rule 72 provides for the examination of every proof by the trustee after his appointment, and gives him power either to reject or admit it, or to require further evidence in support of it. And Rule 134 (7) prevents two persons from receiving dividends upon the same bill of exchange. The cases cited in *Griffith & Holmes'* Bankruptcy (8) as authorities for

(1) 8th Ed. vol. i. p. 153.
(2) 11th Ed. p. 194.
(3) Vol. i. p. 722.
(4) Buck, 390.
(5) Law Rep. 3 Ch. 232.
(6) Rule 67. "A creditor may prove his debt at any duly summoned meeting of creditors, or at any time before the meeting, by delivering or sending through the post in a prepaid letter, before the appointment of a creditor's trustee, to the Registrar of the Court, and after the appointment of a creditor's trustee, to such trustee, an affidavit according to the form in the schedule" (No. 32).
(7) Rule 134. "All bills of exchange or other negotiable securities, upon which proof has been made, must be exhibited to the trustee before payment of dividend."
(8) Vol. i. p. 648.

what is said to have been the old practice do not make out the proposition which is there stated.

SIR JAMES BACON, C.J. :—

The practice in bankruptcy has been established for many years, that when a creditor who holds a bill of exchange as security comes to prove his debt he must produce the bill. That practice is as much part of the law now as it ever was, for sect. 78 of the Act of 1869 says, that the old practice in bankruptcy is still to prevail, so far as the new rules do not extend. When the creditor comes to receive a dividend he must again produce the bills of exchange which he holds. That is because they may have been parted with between the proof and payment of dividend. If the old practice has been in fact relinquished since the Act of 1869 was passed, that must be corrected; the reason for it is obvious. If by some accident a creditor was unable to produce his security, of course the Judge would have a discretion in the matter. That is not the present case. The bank had the bills in their possession, and there is no shadow of a reason for their not producing them. The appeal must be allowed, and the order admitting the proof must be discharged. I make no order as to costs.

Solicitors for the Appellants: Messrs. *Wilkins, Blyth, & Marsland,* agents for Mr. *Crowther Davies, Birmingham.*

Solicitors for the Bank: Messrs. *Field, Roscoe, & Co.,* agents for Messrs. *Barlow & Smith, Birmingham.*

C. J. B.
1874
March 2.

Ex parte SOUTHAM. *In re* SOUTHAM.

Bill of Sale—Validity—Defeasance or Condition—Registration—Possession—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 2.

10 Ch. 370-1
6 Ch. D. 157
21 Ch. D. 76-9

A bill of sale of furniture was given to secure the payment of £250 and interest, the money being made payable on demand. In default of payment on demand the mortgagee was empowered to take possession. The bill of sale was registered within the proper time. There was a prior parol agreement, not appearing in the bill of sale, that the debt should be paid off by small weekly instalments. The mortgagor was adjudicated a bankrupt, but before the adjudication was made the mortgagee had taken possession :—

Held, that this parol agreement amounted to a defeasance or condition within the meaning of sect. 2 of the *Bills of Sale Act*, 1854; and that, as the agreement was not registered, the bill of sale was void as against the trustee under the bankruptcy.

THIS was an appeal from a decision of the Judge of the *Manchester* County Court.

On the 4th of April, 1873, *T. W. Southam*, a commission agent at *Manchester*, was adjudicated a bankrupt upon a petition presented on the 3rd of April. The act of bankruptcy alleged had been committed on the 25th of March.

In the year 1869 the bankrupt purchased of his uncle, Mr. *Edward Southam*, some household furniture for £250. He was unable to pay the price at once, and he gave his uncle a bill of sale of the furniture to secure the price. This bill of sale was dated the 14th of August, 1869, and was expressed to be made between the bankrupt of the one part, and *Edward Southam* of the other part. By it, in consideration of £250 due by the bankrupt to *Edward Southam*, the bankrupt assigned his household furniture and all other goods, chattels, and effects in and about his dwelling-house to *Edward Southam* absolutely, subject to a proviso making void the assignment on payment of the £250, with interest, on demand. It was also provided that after default in payment *Edward Southam* might enter and take possession of the property, and sell the same. There was also a covenant to pay the £250, with interest, on demand. The evidence in the case shewed, in the opinion of the Chief Judge, that prior to the execution of the bill of sale a verbal agreement had been come to between the parties that the

bankrupt should pay the £250 off by weekly instalments of £1 or £1 10*s.*, and that if he did this the security should not be enforced. The bill of sale was registered on the 3rd of September, 1869, but no notice of the parol agreement appeared on the register. Some of the instalments were paid by the bankrupt. In April, 1871, *Edward Southam* took possession of the property, but withdrew upon the bankrupt giving him further security for the balance then due. On the 3rd of April, 1873, *Edward Southam* again took possession of the property. The same day a receiver was appointed under the bankruptcy petition, who took possession of the bankrupt's property, but after *Edward Southam* had entered. The furniture was afterwards sold by the trustee, and the purchase-money, £106 11*s.* 10*d.*, was paid into Court. An issue was directed to try the question whether the trustee or *Edward Southam* was entitled to it. The Judge decided that the money formed part of the bankrupt's estate. *Edward Southam* appealed.

The ground of the decision was this, that because the parol agreement for payment by instalments did not appear in the bill of sale as registered, the bill of sale was void under sect. 2 (1) of the *Bills of Sale Act*, 1854 (17 & 18 Vict. c. 36).

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant :—

As possession was taken under the bill of sale before the adjudication, and without notice of any act of bankruptcy, registration was unnecessary, and sect. 2 does not apply. At any rate the parol agreement is not such a defeasance or condition as is aimed at. No one could be misled into giving credit to the bankrupt through looking at the bill of sale as registered. If such a person had been aware of the parol agreement he would have found that

(1) Sect. 2: "If such bill of sale shall be made or given, subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this Act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a copy thereof, respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes, as against the same persons and as regards the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of this Act."

C. J. B. 1874 *Ex parte* SOUTHAM. *In re* SOUTHAM.

the bankrupt was in fact in a more favourable position than the bill of sale had led him to suppose. He could not, therefore, have been misled to his injury. *Bramwell* v. *Eglinton* (1) and *Robinson* v. *Collingwood* (2) do not apply.

Mr. *Little*, Q.C., and Mr. *Hamilton Humphreys*, for the trustee, were not called upon.

SIR JAMES BACON, C.J. :—

I think that there is no ground for objecting to the judgment of the County Court Judge. The case comes as distinctly within the spirit, the intention, and the meaning, as it does within the very words, of sect. 2 of the *Bills of Sale Act*. The object of the Act was to protect creditors in their dealings with their debtors, to enable them to know whether the persons with whom they are dealing are entitled to credit. The case is plain in its facts. Because the bankrupt was unable to pay down cash at once for the furniture which he had agreed to buy, the parties came to an agreement for the payment of the price by very easy instalments. The bill of sale which was afterwards given contains no reference whatever to that agreement. Mr. *Robertson Griffiths* said that he did not care whether that agreement was entered into before or after the execution of the bill of sale. In my opinion it makes all the difference whether it was before or after. That creditors are prejudiced by the agreement is upon the very surface. Suppose a person about to deal with the debtor had looked at the register, he would at once, if he was a prudent man, have said, "I cannot give you credit, because you have executed a bill of sale of your furniture." The answer to this would have been, "True, I have done this, but the bill of sale was given upon the condition that, if I pay the weekly instalments of the debt regularly, it shall not be enforced." The Act says that if there be any condition it shall be written upon the instrument which is registered, otherwise that instrument shall be void as if it had not been registered at all. If this condition had been written in the bill of sale which was registered, the creditor could have inquired whether the instalments had been duly paid. To such an inquiry the answer

(1) 5 B. & S. 39. (2) 17 C. B. (N.S.) 777.

would have been, "I have only partially performed that agreement, and I have given additional security for the debt." In my opinion the case comes, as the County Court Judge has decided, distinctly within the provisions of the Act. The condition is undoubtedly one the performance of which might have been enforced in a Court of Equity; whether it could have been enforced in a Court of Law may be doubted after the decision in *Bramwell* v. *Eglinton* (1). But in that case the condition could, no doubt, have been enforced in a Court of Equity, though upon what terms it is unnecessary to inquire. But the decision there does not affect the principle of my present decision. Upon the evidence which has been given, it is clear that there was an agreement for purchase and sale of this furniture, and for payment by instalments, before the bill of sale was talked of. The decision of the County Court Judge was right, and I cannot disturb it. The appeal must be dismissed with costs.

Solicitor for the Appellant: Mr. *A. D. Smith.*

Solicitors for the Respondent: Messrs. *Johnson & Weatheralls*, agents for Mr. *Storer, Manchester.*

(1) 5 B. & S. 39. 10 Jur N S 583.

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AFFIDAVIT SWORN ABROAD—*British Consular Agent—Burgermeister—Practice*—15 *&* 16 *Vict. c.* 86, *s.* 22—*Adult and Infant Plaintiffs.*] In a suit in which infants jointly with their mother were Plaintiffs, an affidavit, sworn abroad, by the Defendants, not before a British consul or vice-consul, as required by the provisions of the statute 15 & 16 Vict. c. 86, s. 22, but before the burgermeister of the town at which the Defendants resided, was allowed, with the consent of the mother, to be filed. BELL *v.* TURNER - 439

AGREEMENT—Raising and selling coal—Specific performance - - - 132
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ANNUITY—Charge on *corpus* or income 324
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—— Coupled with duty—Trustee - - 546
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ANNUITY CHARGED ON CORPUS—*Arrears—Distress and Entry—Devise in Strict Settlement.*] Testator gave all the residue of his real and personal estate to trustees for a term of eleven years from his decease, upon trust to pay out of the rents, interest, dividends, and proceeds, certain life annuities; and he directed that the residue of the rents, &c., should, during the term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate at the expiration of the term; and after the determination of the term he devised his real estate, subject to and charged with the payment of the annuities for the residue of the lives, with powers of distress and entry for the recovery of the same, as if the same had been secured by a lease for years, unto the trustees, in strict settlement:—*Held*, that the arrears and annuities were not charged upon the *corpus*, but upon the income, and must be paid out of the income and future income, so far as any might be required. Taylor *v.* Taylor. *In re* Taylor's Estate Act - - - - - - 324

2. —— *Arrears—Bill for Sale—Power of Distress.*] A testator bequeathed certain leasehold property to his nephew, upon condition that he should pay out of the rents and profits thereof an annuity of £70. The annuity was paid for sixteen years, but for the half-yearly sum of £35, due on the 15th of August, 1872, the nephew gave a cheque, which was dishonoured, and the annuitant filed a bill on the 25th of November, 1872, for the sale of the property and for a receiver:—*Held*, that as the estate was amply sufficient to answer the annuity, the Plaintiff might have recovered the arrears by distress, or might have brought an action upon the dishonoured cheque; and bill dismissed. Kelsey *v.* Kelsey [495

APPOINTMENT—Married woman—Transfer of shares to donee of power - - 8
See Appointment by Married Woman.
—— Precatory trust—Will - - - 320
See Precatory Trust.
—— Trustees for sale—Tenant for life - 351
See Power to appoint New Trustees.

APPOINTMENT BY MARRIED WOMAN—*Transfer of Shares to Donee of Power.*] *R.* being trustee of shares in an unlimited company for Mrs. *F.*, a married woman, joined with Mr. and Mrs. *F.* in a deed whereby the shares were assigned to *L.* upon trust for Mrs. *F.* during her life for her separate use, and after her death as she should by deed or will appoint. Shortly afterwards Mr. *F.* died, and subsequently *R.* transferred the shares to Mrs. *F.*, who executed the deed of transfer:—*Held*, that the deed of transfer was an exercise in favour of Mrs. *F.* of the power of appointment reserved to her. Marler *v.* Tommas - - - - 35

APPORTIONMENT OF RENT—*Tenant for Life and Remainderman—Grant of Rent-charge—Mortgagor and Mortgagee—Assign of Tenant for Life—4 & 5 Will. 4, c. 22, s. 2.*] A mortgagee who is not in possession is not an assign of the mortgagor within the meaning of the *Apportionment Act* (4 & 5 Will. 4, c. 22), s. 2. *M.*, the tenant for life of real estate, granted to *W.*, in consideration of an antecedent debt of £6000, a yearly rent-charge of £960, to be issuing out of the estate for a term of 100 years, if *M.* should so long live, with powers of entry and distress in the event of the rent-charge falling into arrear; and *M.* also demised the estate for a term of 200 years, if he should so long live, to a trustee upon trust for the better securing the rent-charge. *M.* died when the rent-charge was in arrear, but before *W.* or the trustee had entered on the estate:—*Held*, that *W.* was not entitled to be paid the arrears of the rent-charge out of the apportioned part of the rents for the period which elapsed between the quarter-day last preceding *M.'s* death and the day on which he died. *In re* Marquis of Anglesey's Estate. Paget *v.* Anglesey 283

2. —— *Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35)—*Devise of Real Estate—Apportionment between Executor and Devisee.*] A testator seised in fee devised real estate by a will dated before the *Apportionment Act*, 1870, and confirmed by a codicil dated after the Act:—*Held*, that the rents were apportionable between the executor and the devisee.—*Semble*, that the result would have been the same without the codicil.—*Jones* v. *Ogle* (Law Rep. 8 Ch. 192) considered. Capron *v.* Capron - - - - - 288

ARBITRATION—Submission to—Limit of time for complaint—Setting aside award 476
See Submission to Arbitration.

ARREARS—Annuity charged on land—Bill for sale - - - - - 495
See Annuity charged on Corpus. 2.
—— Rent-charge—Chief rent—Bill for sale of land - - - - - 437
See Arrears of Rent-charge.

ARREARS OF RENT-CHARGE—*Improved Chief Rents—Land ordered to be sold to pay Arrears accrued since* 1853.] Land, on which an improved chief rent, which was purchased by the Plaintiff's testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date. *Taylor* v. *Taylor* (Law Rep. 17 Eq. 324) distinguished. Horton *v.* Hall 437

AWARD—Setting aside—Limit of time for complaint - - - - 476
See Submission to Arbitration.

BAILEE—Gratuitous—Bankers - - 224
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BANKER—Choice of, by creditors in liquidation by arrangement - - - 457
See Trustee in Liquidation.
—— Lien—Deposit of box of securities - 224
See Deposit for Safe Custody.

BANKRUPTCY—Administratrix—Goods of intestate—Order and disposition - 46
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—— Covenant for future settlement - 115
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See Creditor holding Security.

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See Order and Disposition. 1, 2.
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See Securities for Bills of Exchange.
—— Unstamped—Equitable assignment—Order to pay money - - - 109
See Unstamped Bill of Exchange.
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See Securities for Bills of Exchange.
—— Mate's receipts—Local custom - 92
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—— Unregistered—Bankruptcy of administratrix - - - - - 46
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BLANK TRANSFER—Deposit of certificate of shares - - - - 273
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See Affidavit sworn Abroad.

CASES—*Brownson* v. *Lawrance* (Law Rep. 6 Eq. 1) questioned - - - - 153
See Locke King's Act.
—— *Butler's Will, In re* (Law Rep. 16 Eq. 479) not followed - - - 300
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—— *Coote* v. *Whittington* (Law Rep. 16 Eq. 534) dissented from - - - 20
See Executor de son Tort.
—— *Crowther* v. *Crowther* (23 Beav. 305) not followed - - - - 378
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—— *Fothergill's Case* (Law Rep. 8 Ch. 270) considered - - - - 169
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—— *Greville* v. *Brown* (7 H. L. C. 689) followed
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—— *Hackney Charities, In re* (34 L. J. (Ch.) 169) not followed - - - 241
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—— *Hawkins, Ex parte* (13 Sim. 569) followed
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—— *Jones* v. *Ogle* (Law Rep. 8 Ch. 192) considered - - - - 288
See Apportionment of Rent. 2.
—— *Keynsham Company, In re* (33 Beav. 123) discussed - - - - 268
See Injunction in Winding-up.
—— *Levick, Ex parte* (Law Rep. 5 Eq. 69) discussed - - - - 268
See Injunction in Winding-up.
—— *Life Association of England* (34 L. J. (Ch.) 64) discussed - - - 268
See Injunction in Winding-up.
—— *Marino's Case* (Law Rep. 2 Ch. 596) discussed
See Transfer of Shares. [273
—— *Maude, Ex parte* (Law Rep. 6 Ch. 51) distinguished - - - - 491
See Distribution of Surplus Assets.
—— *Noel* v. *Noel* (1 D. J. & S. 468) - 402
See Production of Documents. 1.
—— *Peninsular, &c., Banking Company, In re* (35 Beav. 280), discussed - - 268
See Injunction in Winding-up.
—— *Rayner* v. *Koehler* (Law Rep. 16 Eq. 262) dissented from - - - - 20
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—— *Spargo's Case* (Law Rep. 8 Ch. 407) considered - - - - 169
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—— *Taylor* v. *Taylor* (Law Rep. 17 Eq. 324) distinguished - - - - 437
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—— *Wright* v. *Pitt* (Law Rep. 3 Ch. 809) 402
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CHARITY COMMISSIONERS — *Appointment of New Trustees—Jurisdiction—Contentious Case—National School—Transfer to School Board—Discretion of Charity Commissioners*—6 & 7 *Will.* 4, *c.* 70, *s.* 3—4 & 5 *Vict. c.* 38, *s.* 7—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 28, 32, 46—*Charitable Trusts Act*, 1860 (23 & 24 *Vict. c.* 136), *ss.* 2, 5—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75, *ss.* 2, 23.] The Charity Commissioners may, if they think fit, exercise the jurisdiction conferred on them by the *Charitable Trusts Act*, 1860, in contentious cases.—*Dictum* of Lord *Romilly*, M.R., in the case of *In re Hackney Charities* (34 L. J. (Ch.) 169) not followed.—Where the site of a National School founded in connection with the Church of *England* was, under the powers of the Act 6 & 7 Will. 4, c. 70, s. 3, and 4 & 5 Vict. c. 38, s. 7, conveyed to the joint rectors for the time being of the parish in which the school was situated, as sole trustees:—*Held*, that the Charity Commissioners had jurisdiction to appoint new trustees; that such trustees must be members of the Church of *England*; but that it was no objection to the exercise of the jurisdiction that the proper majority of the trus-

CHARITY COMMISSIONERS—*continued.*
tees might, under the provisions of the *Elementary Education Act*, 1870, transfer the school to a school board.—The Court of Chancery will not interfere with the discretion of the Charity Commissioners in selecting new trustees unless in cases of gross and palpable miscarriage. *In re* Burnham National Schools - - - - 241

CHEQUE—Forged—Comparison of handwriting
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CHIEF RENTS—Arrears—Sale of land charged
See Arrears of Rent-charge. [437

CHILD—Illegitimate—Gift to - 345, 463
See Illegitimate Children. 1, 2.

CHOSE IN ACTION—Order and disposition—Shares in company - - - 113
See Order and Disposition. 2.

CLASS—Ship—Suspension of - - - 190
See Injury to Reputation.

COAL MINE—Lease - - - - 358
See Mining Lease.

CODICIL—Repetition of legacies - - 50
See Cumulative Gifts.

—— Republication by - - - 65
See Ademption.

COLLATERAL AGREEMENT—*Specific Performance—Statute of Frauds—Written Contract afterwards varied by Parol Agreement.*] Plaintiff, the owner of six leasehold houses, agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and, as he (Plaintiff) alleged, agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house No. 737, and a third house, numbered 739, to *G. T.*, also a grocer, and the agreement, which was in writing an d dated the 6th of July, 1870, contained nothing about a restrictive covenant, but an underlease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the underlease and counterpart on a certain day; but on the previous evening *G. T.* died suddenly, intestate. It was stated, but on the Plaintiff's evidence only, that after the written agreement of the 6th of July, and before *G. T.'s* death, *G. T.* verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shewn that the insertion of such a restriction would considerably diminish the value of the property:—*Held*, that the Defendant, the administrator of the intestate, could not be compelled to execute a counterpart of a lease containing such a restriction.—The written agreement of the 6th of July stipulated that the property should be bought "subject to the existing tenancies." The Plaintiff alleged that on the 6th of July the lessee of the house No. 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the day before the agreement of the 6th of July, was produced, containing such a covenant. It having

COLLATERAL AGREEMENT—*continued.*
been shewn that the lease was antedated and was not in fact executed till after the 6th of July, 1870:—*Held*, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction.—Circumstances under which acceptance of a verbal alteration in a written agreement will not be inferred. Snelling *v.* Thomas - - - - - 303

COMMISSIONERS—Charity - - - 241
See Charity Commissioners.

COMMUNICATION—Privileged - - 329
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COMPANY—Distribution of surplus assets 491
See Distribution of Surplus Assets.

—— Not having commenced business—Winding-up order - - - - 534
See Winding-up Petition. 3.

—— Notice to treat - - - 142, 217
See Compulsory Powers. 1, 2.

—— Rectification of register - - 273
See Rectification of Register.

—— Subscriber of memorandum - - 169
See Subscriber of Memorandum.

—— Transfer of shares - - - 273
See Transfer of Shares.

—— Unregistered—Incorporated by Act of Parliament—Winding-up - - 181
See Winding-up Petition. 2.

—— Winding-up petition - 1, 181, 423, 534
See Winding-up Petition. 1—4.

COMPENSATION—Waterworks Clauses Act, 1847—Minerals—Severance - - 476
See Compulsory Powers. 3.

COMPOSITION—Failure to pay - - 332
See Injunction in Bankruptcy.

COMPULSORY POWERS—*Railway Company—Notice to treat—Extension of Time—Abandonment—Subscription Contract—Magistrate's Certificate—"Sufficient Evidence"—Lands Clauses Act, s.* 17.] The *J. Railway Company's Act*, passed in July, 1864, provided that certain persons who had subscribed, and all others who should subscribe, to the undertaking, should be incorporated for the purpose of making the railway thereby authorized, and by the same Act the compulsory powers for taking lands were limited to three years, and the time for completing the works to five years from the passing of the Act. The company, having obtained the magistrate's certificate that the whole of the required capital had been subscribed for, served a notice to take certain lands of the Plaintiffs. In 1869 the company, having failed to raise sufficient capital to make the line, obtained an Act, of which the Plaintiffs had notice, for amalgamating their company with the *Neath and Brecon Company*, who were to make the railway, and the time for completion was extended to July, 1872. In 1871 the *Neath and Brecon Company* proceeded under the notice to take the Plaintiffs' land.—On a bill praying an injunction to restrain the *Neath and Brecon Company* from taking the land, alleging that the notice to treat, if valid, had been abandoned by lapse of time, and that such notice was invalid, as no subscription contract had been proved, and the required capital had not then been subscribed for:—*Held*,

COMPULSORY POWERS—*continued.*

that, under the circumstances, there had been no abandonment of the notice:—*Held*, also, that the magistrate's certificate, under sect. 17 of the *Lands Clauses Act*, was conclusive evidence that the capital was subscribed for; that it appeared from the *J. Railway Company's Act* that there was a subscription contract, and that the notice to treat was valid. Ystalyfera Iron Company *v.* Neath and Brecon Railway Company - - 142

2. —— *Notice to treat by Railway Company—Valuation—Bequest of Leaseholds—Death of Testator—Ademption—Right to Intermediate Rents—Wills Act* (1 *Vict. c.* 26), *s.* 23—*Statute of Frauds.*] *W. W.*, by will, in 1859, bequeathed leaseholds to his sister *A.*, and the residue of his estate to his sister *E.*, and in 1865 was served with a notice on the part of a railway company to treat for the purchase, under the provisions of their Acts, of the leaseholds for the purposes of their railway. Surveyors appointed by *W. W.* and the company, but not in writing, settled the value of the leaseholds, and the former verbally agreed to accept the sum named. *W. W.* died in February, 1869, the matter remaining in abeyance till April, 1870, when the sale was completed by the executor:—*Held*, that the notice to treat, followed by the valuation of the surveyors, was, notwithstanding the *Statute of Frauds*, a valid contract; that there had been an ademption of the bequest to *A.*; but that *A.* was entitled to the rents which had accrued between the death of the testator and the completion of the purchase by the company.—*Ex parte Hawkins* (13 Sim. 569) followed. *Haynes* v. *Haynes* (1 Dr. & Sm. 426) distinguished. Watts *v.* Watts - - 217

3. —— *Parliamentary Notice to Landowner—Limits of Deviation — Minerals — Damage by Severance of Minerals.*] A Corporation, previously to an application to Parliament for an Act, served the usual Parliamentary notice of their intention to apply for power to take certain land. In the margin of the schedule the property proposed to be taken was referred to as "Property in the line of the proposed work as at present laid out (including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work as delineated upon the plan):—*Held*, that the Corporation were not by this statement restricted from taking a greater total breadth than twenty-two yards, provided that what they took was within the limits of deviation prescribed by their Act:—*Held*, further, that, if necessary, the words "or thereabouts" might be considered to extend the limit to an entire breadth of one-third more than the specified quantity of twice eleven yards.—*Held*, further, that after a reference to arbitration the landowner was bound to sell all that was comprised in the notice to treat, whether it was or was not within the compulsory powers of the Corporation.—Where a Corporation were under an Act empowered to make a conduit for water through a field at some distance below the surface:—*Held*, that it was not necessary for them to make compensation for damage by severance of minerals where they were not required by the provisions of the *Waterworks Clauses Act*, 1847, to purchase them. *In re* Corporation of Huddersfield and Jacomb 476

COMPULSORY POWERS—*continued.*

4. —— *Local Board of Health—Power to take Property—Town Improvements.*] The Defendants, being the Local Board of Health for *Bristol*, were empowered by an order of the Secretary of State, confirmed by Act of Parliament, to take certain lands and houses specified in the schedule, for the purpose of widening and improving a street; and served the usual notices to treat under the *Lands Clauses Act* upon the Plaintiffs. The Plaintiffs filed their bill to restrain the Defendants from taking more of the property comprised in the schedule than was actually required for the purpose of widening the street:—*Held*, that as the Defendants required this property for the improvement of the town, from which no profit or compensation was obtained, they were not confined, like railway companies, to the narrow limits of the property actually required for the purpose specified, but were at liberty to purchase all the property included in the schedule. Quinton *v.* Corporation of Bristol - - - 524

CONDONATION—Act of bankruptcy—Petition for adjudication - - - 454
See Debtor's Summons.

CONSENT OF LESSOR—Covenant not to assign—Underlease - - - 549
See Covenant not to assign.

CONSOLIDATED ORDERS—Order x. r. 7 - 432
See Service out of Jurisdiction.

CONTINGENT REMAINDER—Estate of trustees
See Estate of Trustees. [252

CONTRACT FOR RAISING COAL—*Breach—Injunction—Specific Performance — Jurisdiction.*] The Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform.—Accordingly, where the lessee of a colliery contracted to raise and deliver to the Plaintiffs all the get of coals in the colliery at a fixed price for five years, and subsequently agreed for the sale of the colliery to other parties:—*Held*, on demurrer, that the Court had no jurisdiction to grant an injunction to restrain the breach of contract. Fothergill *v.* Rowland - 132

CONTRIBUTORY—Subscriber of memorandum
See Subscriber of Memorandum. [169

CORPUS OR INCOME—Annuity - - 324
See Annuity charged on Corpus. 1.

COSTS—Administration suit - - 421
See Costs of Administration Suit.

—— Bankruptcy — Liquidation superseded by bankruptcy - - - - 61
See Costs of Liquidation.

—— Lands Clauses Act - - - 340
See Costs under Lands Clauses Act.

—— Mortgage suit—Sum under £500 - 343
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—— Mortgage suit — Higher or lower scale — Mortgage under £1000 - - 543
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—— Security for - - - - 430
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—— Solicitor's charge on property preserved 222
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—— Suit to cancel policy of insurance - 85
See Restraining Action on Policy.

COSTS—*continued.*
—— Winding-up petition - - - 423
See Winding-up Petition. 3.

COSTS OF ADMINISTRATION SUIT—*Mortgage—Creditors' Suit by Mortgagee—Deficient Estate—Priority.*] In a suit by a legal mortgagee for a sale and general administration of the deceased mortgagor's estate, the Court refused to vary the minutes by directing, in case of deficiency of assets, the costs of suit of the executors and devisees of the mortgagor to be paid in priority to the mortgagee's costs of sale. Pinchard *v.* Fellows - - - - - 421

COSTS OF LIQUIDATION—*Bankruptcy pending Liquidation Proceedings—Adjudication made after the Creditors have refused to agree to Liquidation or Composition—Bankruptcy Rules*, 1870, *r.* 292.] On the 31st of January a debtor filed a liquidation petition. n the 28th of February the first meeting of the creditors was held, when the creditors refused to pass any resolution in favour of liquidation or composition. On the 1st of March the debtor filed a declaration of insolvency, and the same day a creditor filed a bankruptcy petition founded upon the declaration, and the debtor was adjudicated a bankrupt. The trustee refused to pay the costs of the liquidation petition out of the estate:—*Held* (reversing the decision of the County Court Judge), that the liquidation proceedings were, within the meaning of the *Bankruptcy Rules*, 1870, r. 292, pending when the bankruptcy took place, and that the costs of the petition ought to be paid out of the estate of the bankrupt. *Ex parte* Jeffery. *In re* Hawes - - - - - - 61

COSTS UNDER LANDS CLAUSES ACT—*Railway Company—Taking of Lands—Payment of Purchase-Money into Court—Transfer to Suit—Subsequent Costs.*] Where the purchase-money for lands taken by a railway company under Parliamentary powers has been paid into Court to the usual account, and has afterwards been transferred to the credit of a suit to an account not intituled in the matter of the special Act, the Court has no jurisdiction to make the company pay subsequent costs of paying the fund out of Court. Fisher *v.* Fisher - - - - - - - 340

COUNTY COURT—Administration suit—Injunction before decree - - - 297
See Injunction by County Court.
—— Equitable jurisdiction - - 343, 415
See County Court Jurisdiction. 1, 2.

COUNTY COURT JURISDICTION—*Equitable Jurisdiction—Concurrent Jurisdiction of Court of Chancery—Costs.*] The Acts conferring equitable jurisdiction on the County Courts do not in any way prohibit or restrict a Plaintiff from instituting proceedings in the Court of Chancery; and a Plaintiff who institutes such proceedings is entitled to his usual costs.—Where, therefore, a suit was instituted in the Court of Chancery for foreclosure of a mortgage for £50:—*Held*, that the Plaintiff was entitled to the usual costs of a mortgagee who sues in that Court. Brown *v.* Rye 343

2. —— *Limit of Value—Commencement of Proceedings—Transfer to the Court of Chancery—County Courts Act*, 1865 (28 & 29 *Vict. c.* 99), *s.* 9; **COUNTY COURT JURISDICTION**—*continued.*
County Courts Act Amendment Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 14.] The 14th section of the *County Courts Act*, 1867, does not repeal the 9th section of the *County Courts Act*, 1865. The two sections must be construed together, and where it appears from the plaint itself that the County Court has no jurisdiction the suit ought to be dismissed under the 14th section of the Act of 1867; but where the want of jurisdiction appears only from evidence produced after the institution of the suit, the proper course is to order the proceedings to be transferred to the Court of Chancery under the 9th section of the Act of 1865. Thomson *v.* Flinn - - - - - - 415

COUNTY COURT ORDERS IN EQUITY, 1865—Ord. I. r. 8; Ord. XII. r. 1 - 297
See Injunction by County Court.

COVENANT—For future settlement, when void against creditors—Bankruptcy - 115
See Covenant to settle.
—— Mining lease—Mode of working - 353
See Mining Lease.
—— Not to assign - - - - 549
See Covenant not to assign.

COVENANT NOT TO ASSIGN—*Lessor and Lessee—Underlease—Covenant not to assign or underlet without License—Like Provisions.*] Where a lessee subject to a covenant not to assign without the lessor's consent, having obtained such consent, agrees to grant an underlease to contain the like provisions as the lease:—*Held*, that in the covenant in the underlease against assignment the original lessor was the person whose consent should be required. Williamson *v.* Williamson [549

COVENANT TO SETTLE—*Marriage Settlement—Validity—Subsequent Bankruptcy of Settlor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.] A trader, in April, 1868, executed a settlement upon his marriage, by which he settled certain specific chattels upon trust for the benefit of his wife and the issue of the marriage. The settlement also contained a covenant by the settlor with the trustees that all future real or personal estate which he should at any time during the coverture be possessed of or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, should be conveyed and assigned to the trustees upon the trusts thereby declared. In 1870 the settlor bought some shares in a joint stock company. In February, 1873, he was adjudicated a bankrupt. At this time the shares were still standing in his name, but the certificates were in the possession of his wife's father, and they were afterwards delivered to the trustees of the settlement. It was shewn that the settlor was solvent at the date of the settlement:—*Held*, that the covenant was void as against the creditors, and that the trustee under the bankruptcy was entitled to the shares. *Ex parte* Bolland. *In re* Clint - - - - - - 115

CREDITOR—Action by—Injunction - 332
See Injunction in Bankruptcy.
—— Petition to wind up company. 1, 423
See Winding-up Petition. 1, 3.

CREDITOR—*continued.*
—— Resolution for composition—Extraordinary resolution - - - - 121
See Majority of Creditors.
—— Secured—Bankruptcy - - - 575
See Creditor holding Security.

CREDITOR HOLDING SECURITY—*Practice—Proof of Debt—Production of Security—Bill of Exchange—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-s.* 2, *s.* 78—*Bankruptcy Rules*, 1870, *rr.* 67, 72, 134—*Forms of* 1870, *No.* 32.] A creditor who holds a bill of exchange as security cannot prove his debt at the first meeting of creditors without producing the bill. *Ex parte* Jacobs. *In re* Carter - - - 575

CUMULATIVE GIFTS—*Legacies to the same Person by different Instruments—Substitutional, not Cumulative.*] A testator gave two legacies of £5000 each to the same person by two codicils executed at the same time, and in nearly the same words, neither codicil comprising any other legacy. One instrument he sent to his solicitor and the other he sent to the legatee. Three years afterwards he withdrew the codicil held by his solicitor and sent it also to the legatee. He had previously executed his will in duplicate, sending one copy to his solicitor and the other to the principal beneficiary:—*Held*, that the legacies given by the two codicils were substitutional and not cumulative. Whyte *v.* Whyte - - - 50

CUSTOM—Coal mine—Mode of working - 358
See Mining Lease.
—— Trade—Local custom—Mate's receipts for goods shipped - - - 92
See Property in Goods shipped.

DAMAGES—Unliquidated—Bequest of "money due at my decease" - - 76
See "Money."

DEBENTURE HOLDER—Company incorporated by Act of Parliament—Right to winding-up order - - - - 181
See Winding-up Petition. 2.

DEBT—Acknowledgment—Statute of limitations
See Limitations, Statute of. [71
—— Release of interest by will - - 65
See Ademption.

DEBTOR'S SUMMONS—*Act of Bankruptcy—Condonation—Petition for Adjudication—Arrangement between Debtor and Creditor—Dismissal of Petition—Refusal of Debtor to carry out the Arrangement—New Petition founded on same Act of Bankruptcy—Bankruptcy Rules*, 1870, *r.* 39.] A petition in bankruptcy was presented, founded on non-compliance with a debtor's summons. Before the day fixed for the hearing the debtor promised the petitioning creditor to secure his debt and to pay his other creditors. The petition was dismissed for want of prosecution. The debtor then refused to fulfil his promise. The creditor obtained special leave, under rule 39, to present a new petition, and he did so:—*Held* (reversing the decision of the County Court Judge), that there had been no condonation of the act of bankruptcy, and that the petition must be heard on its merits. *Ex parte* Love. *In re* Jager - - 454

DECLARATION OF TITLE—Bill for infant 378
See Ejectment Bill by Infant.

DEEDS—Deposit of, for safe custody—Box of securities at bankers—Lien - 224
See Deposit for Safe Custody.
—— Deposit of—Negligence - - 15
See Priority lost by Negligence.

DEFAULTING TRUSTEE—*Beneficial Derivative Interest.*] A defaulting trustee cannot claim, as against his *cestuis que trust*, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a *cestui que trust* who has died intestate. Jacubs *v.* Rylance 341

DEFEASANCE—Bill of sale—Registration 578
See Registration of Bill of Sale.

DELAY—Bill of sale—Bankruptcy of administratrix - - - - 46
See Order and Disposition. 1.
—— Notice to treat—Abandonment - 142
See Compulsory Powers. 1.

DEPOSIT FOR SAFE CUSTODY—*Banker's Lien—Deposit of Boxes and Securities with Bankers—Lunacy—Committees—Judgment and Charging and Garnishee Orders—Injunction.*] Bankers who, according to the usual custom in *London* between bankers and stockbrokers, made, upon the security of share certificates and other property deposited with them, advances to a stockbroker for specific purposes, were held not to have a general lien on boxes and their contents deposited with them for convenience and safe custody by the same stockbroker, he keeping the keys of and having constant access to the boxes, and the bankers—mere gratuitous bailees—not knowing, till after he had by inquisition been found lunatic, the contents of them; but that the committees of the lunatic were entitled to have the boxes and their contents delivered up to them, notwithstanding that the bankers had obtained a judgment in an action for the payment of the balance due to them on the lunatic's banking account; and also certain charging and garnishee orders. Leese *v.* Martin - - - 224

DEPOSIT OF CERTIFICATES—Share in company
See Transfer of Shares. [273

DEPOSIT OF DEEDS—Box of securities at bankers—Lien - - - - 224
See Deposit for Safe Custody.
—— Negligence—Priority—Constructive notice
See Priority lost by Negligence. [15

DEVISE—Specific and residuary—Marshalling assets - - - - 556
See Marshalling.

DISCOVERY—Privileged communication - 329
See Privileged Communication.
—— Production of documents - 402, 517
See Production of Documents. 1, 2.

DISCRETION—Court—Winding-up Petition 1
See Winding-up Petition. 1.
—— Trustees—Powers of investment and management - - - - 24
See Management by Trustees.

DISENTAILING DEED—Payment out of Court
See Payment out of Court. 1. [300

DISSENTIENT CREDITOR—Bankruptcy - 121
See Majority of Creditors.

DISTRESS—Power of—Annuity charged on land [324, 495
See Annuity charged on Corpus. 1, 2.

—— Power of—Chief rent - - - 437
See Arrears of Rent-charge.

DISTRIBUTION OF SURPLUS ASSETS—*Winding-up—Old and New Shareholders—Shares fully Paid and Unpaid Shares—Surplus divisible equally.*] A company having called up and exhausted all its capital, raised new capital, on the terms that, in the event of the winding-up of the company, no call should be made on the new shares for any purpose other than for payment of the debts of the company, and that no call should be made for repayment to the holders of the original shares. Upon the company being subsequently wound up voluntarily, there was found to be a surplus after payment of debts:—*Held*, that this surplus, though arising from payments by the new shareholders, could not be returned under the above resolution to the new shareholders alone, but must be divided between both sets of shareholders.—The original shares of £1 each were fully paid up, but only 16s. had been paid upon the new £1 shares:—*Held*, that the surplus must be divided among both sets of shareholders in proportion to the amounts paid up, and that the old shareholders were not entitled to have their shares equalized with the new shares before division of the surplus.—*Ex parte Maude* (Law Rep. 6 Ch. 51) distinguished. *In re* Eclipse Gold Mining Company - - - - 490

DOCK COMPANY—Unregistered winding-up 181
See Winding-up Petition. 2.

DOCUMENTS—Production of - - 402, 517
See Production of Documents. 1, 2.

DOMICIL OF ORIGIN—*Abandonment—Domicil of Choice—Will—Bequest of Residue—Advancement—Ademption.*] A merchant, a native of *Canada*, who carried on his business at *Montreal*, in 1858 retired from business, sold his residence, and also a plot of ground which he had bought for a grave, and went with his wife and two children to reside in *France*, for the purpose of educating the children. He resided in *France* till 1868. In 1867 his wife died there. Early in 1868 he went with his two children to *England*, and in March of that year he purchased a leasehold house at *St. John's Wood*. He furnished the house and continued to live there until his death, in May, 1871. In 1863, 1865, and 1870 he paid visits to *Canada*, on business principally relating to the management of the estate of his father, a Canadian, of whose will he and two of his brothers were the executors. When in *Montreal*, in 1863, he executed a will in the French language, and in the form usual in *Lower Canada*, in which he described himself as then residing at *Montreal*. By this will he in effect (in the events which happened) gave the residue of his property equally between his children on their attaining twenty-one. He also, during this visit to *Canada*, obtained there a certificate of domicil. In 1865 the testator, when he was in *Montreal*, executed a codicil to his will, also in the French language, and in a similar form to the will. The codicil did not affect the gift of the residue. In 1869 the testator's daughter was married in *England* to an Englishman. A settlement was made on her marriage in the usual English form. The trustees were Englishmen resident in *England*. By the settlement the testator covenanted with the trustees that he would during his life, or within six months after his death, pay to them £8500, to be held on trust for the daughter for her life, for her separate use, with remainder to the issue of the marriage. In 1869 the testator apprenticed his son to a merchant in *London*, to whom he paid a premium of £400. He also agreed to purchase for the son a share in the same merchant's business, and paid for this purpose £1100, and he made some other advances for the son. When he was in *Canada*, in 1870, he told his brothers, who resided there, that he intended to return there permanently in a few months. He expressed this same intention to his son, but never mentioned it to his daughter The testator died in *England* in May, 1871. He had only two children, a son and a daughter, both of whom had attained twenty-one before his death. When he died, no part of the £8500 had been paid to the trustees of the daughter's settlement. The testator left no real estate in *England*, *Canada*, or elsewhere. His personal estate comprised Canadian and various foreign securities. There was some evidence to shew that the loss of his Canadian domicil would have disqualified the testator, according to the law of *Canada*, from acting there as his father's executor:—*Held*, that the testator's domicil at the time of his death was English:—*Held*, also, that the gift to the daughter of a share of the residue of testator's estate was adeemed *pro tanto* by the £8500 covenanted to be paid by the settlement. Stevenson *v.* Masson - - - 78

DOMICIL OF ORIGIN—*continued.*

EJECTMENT BILL BY INFANT—*Legal and Equitable Estate—Practice.*] Where an infant is entitled both at law and in equity to real estate as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-Plaintiffs. *Crowther v. Crowther* (23 Beav. 305) not followed. Howard *v.* Earl of Shrewsbury 378

EQUITABLE ASSIGNMENT—Order to pay money—Unstamped bill of exchange - 109
See Unstamped Bill of Exchange.

EQUITY OF REDEMPTION—Law of Judgments Amendment Act - - - 435
See Judgment Creditor.

ESTATE OF TRUSTEES—*Will—Construction—Contingent Remainder—Res judicata.*] A testator, by will dated in 1827, devised his estate to trustees and their heirs upon trust that they and their heirs should stand seised of the same during the life of *W. C.*, and also until the whole of the testator's debts and the legacies thereinafter mentioned were paid, upon trust to set and let the same and apply the rents and yearly profits, and the value of whatever timber might be considered

ESTATE OF TRUSTEES—*continued.*
at its best growth, from time to time, in discharge of his debts until they were paid; then upon further trust to apply the rents and yearly profits from time to time until three legacies were paid, and from thenceforth to pay the rents and yearly profits to *W. C.* and his assigns during his life. And from and immediately after the decease of *W. C.* and the payment of the debts and legacies and all expenses incurred by the trustees, the testator devised the estate to the heirs of the body of *W. C.*, and for default of such issue, to his own right heirs. In 1830 the trustees, by deed reciting that the debts and legacies were paid, conveyed the estate to *W. C.* for his life. *W. C.* shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to *W.* *W. C.* and *W.* afterwards filed a bill against the heir of the surviving trustee and against the eldest son of *W. C.* praying for a declaration that *W. C.* took an equitable estate tail under the will, and for a conveyance of the legal fee to *W.* The son put in an answer, submitting that *W. C.* took only an equitable life estate, and that the conveyance by the trustee in 1830 was a breach of trust, and asking for a declaration to that effect. A decree was made without any declaration, directing the heir of the trustee to convey his estate under the will to *W.*, subject to *W. C.'s* equity of redemption, and was inrolled. After the death of *W. C.* his eldest son filed his bill against *W. C.* to recover the estate, on the ground that the limitation to the heirs of the body of *W. C.* was a contingent remainder, and that the trustees had committed a breach of trust in conveying so as to enable *W. C.* to destroy it by the recovery. *W.* by answer insisted on the inrolled decree as an adjudication on the question:—*Held*, that the trustees took a legal fee under the will; that the rule in *Shelley's Case*, therefore, applied, and that *W. C.* acquired a good equitable fee by the recovery.—A general devise to trustees and their heirs under a will, the purposes of which require them to have some legal estate of freehold, *primâ facie* gives the fee, and it lies on the parties alleging that they take a less estate to shew what less estate will serve the purpose:—*Held*, also, that the trust to set and let, which could not be confined to an authority to let from year to year, and the direction as to the timber, were grounds for not cutting down this estate:—*Held*, further, that assuming the trustees not to have taken the fee, the estate for the life of *W. C.*, which in that view of the case was in 1830 their only estate, was held in trust for *W. C.* only, and not upon any implied trust to preserve contingent remainders; and that they were justified in conveying to *W. C.*, though their doing so enabled him to destroy the contingent remainders:—*Held*, further, that as the Plaintiff had not asked to be dismissed from the suit instituted by *W.* and *W. C.*, but had raised the question of construction in that suit, he was bound by the decree, the direction in which to the trustee to convey his estate was a decision that he had an estate, and that the trustees had taken the fee under the will. Collier *v.* Walters - - - 252

EVIDENCE—Affidavit sworn abroad. - 439
See Affidavit sworn Abroad.

EVIDENCE—*continued.*
—— Bankruptcy—Secured creditor—Production of security - - - - 575
See Creditor holding Security.
—— Expenses of witness - - - 238
See Expenses of Witness.
—— Forged cheque—Comparison of handwriting
See Production of Documents. 2. [517
—— Unstamped bill of exchange - - 109
See Unstamped Bill of Exchange.

EXCLUSIVE APPOINTMENT—*Will—Non-exclusive Power—Gift of Legacies followed by Gifts of Residue—Implied Charge of Legacies.*] The doctrine of *Greville* v. *Browne* (7 H. L. C. 689), viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of the residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive; and in such a case the legacies are charged on property subject to a power of appointment.—A testatrix, having power to appoint certain funds by will in favour of *A.*, *B.*, *C.*, *D.*, and *E.*, in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of £5 each to *A.*, *B.*, and *C.*, and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to *D.* and *E.*, and died leaving some personal estate of her own:—*Held*, that the will was a valid execution of the power. Gainsford *v.* Dunn - 405

EXECUTION CREDITOR — *Trader Debtor — Seizure for Debt above £50—Subsequent Seizure for Debt under £50—Liquidation Petition before Sale—Rights of Second Execution Creditor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6 (*sub-s.* 5), 12, 13, 87—*Bankruptcy Rules*, 1870, *r.* 260.] On the 25th of November the sheriff seized the goods of a trader under a writ of execution for £191, and on the 16th of December another seizure was made for a debt of £32. On the 30th of December the debtor filed a liquidation petition. At this time the sheriff was still in possession, but no sale had been made. On the 22nd of January a trustee was appointed:—*Held*, that the creditor for the £32 was entitled to proceed to a sale under his execution. *Ex parte* Lovering. *In re* Peacock - - 452

EXECUTOR—Advances by—Interest - 554
See Interest on Balances.
—— Apportionment of rent—Devise of real estate - - - - 288
See Apportionment of Rent. 2.
—— Fund in Chancery—Order for payment out of Court - - - - 350
See Payment out of Court. 2.
—— *De son tort*—Administration suit—Parties
See Executor de son Tort. [20
—— *De son tort*—Payment of interest on debt—Statute of Limitations - - 71
See Limitations, Statute of.

EXECUTOR DE SON TORT—*Parties—Administration Suit—Legal Personal Representative—Practice—Costs of the Day.*] The legal personal

EXECUTOR DE SON TORT—*continued.*
representative of a testator is a necessary party to a suit for the administration of his real and personal estate; and if he is not made a party, no decree can be made in such a suit, even although an executor *de son tort* and the trustees of the real estate are before the Court.—*Rayner* v. *Koehler* (Law Rep. 14 Eq. 262) and *Coole* v. *Whittington* (Law Rep. 16 Eq. 534) dissented from.—Where it is plain on the face of the bill that a suit is defective for want of parties, a Defendant raising the objection at the hearing is entitled to the costs of the day, although he may not have taken the objection by his answer. Rowsell *v.* Morris - - - - 20

EXONERATION—Mortgaged estate—Direction to pay debts—Locke King's Act - 153
See Locke King's Act.

EXPENSES OF WITNESS—*Practice — Cross-Examination of Witness—Production of—Payment of Expenses under Rule* 19 *of the Order of 5th Feb.*, 1861.] The party on whose behalf a witness gives evidence, if required by the other side to produce him for cross-examination, is bound in the first instance to pay such witness his reasonable expenses, even though he may be out of the jurisdiction. Richards *v.* Goddard [238

FORECLOSURE—Judgment creditor—Right to file bill - - - - 435
See Judgment Creditor.

—— Sale—Absent mortgagor—*Pro confesso* 425
See Foreclosure Suit.

—— Transfer of mortgage after certificate—Revivor and supplement - - 14
See Revivor and Supplement.

FORECLOSURE SUIT—*Mortgage—Sale—Absent Mortgagor.*] After a decree for foreclosure, but before it was drawn up, a sale was directed on the application of one of the Defendants, a *puisne* mortgagee, with the consent of the prior mortgagees, in the absence of the mortgagor, against whom the bill had been taken *pro confesso*. Woodford *v.* Brooking - - - 425

FOREST OF DEAN—Free miners—Right to gales
See Free Miners. [502

FORGED CHEQUE—Comparison of handwriting
See Production of Documents. 2. [517

FRAUD—Policy attained by - - 85
See Restraining Action on Policy.

FRAUDS, STATUTE OF—Collateral agreement
See Collateral Agreement. [303

—— Notice to treat by railway company - 217
See Compulsory Powers. 2.

FREE MINERS—*Petition of Right—Right to "Gales"—Application for Grant—Death before Registration—Transmissible Interest.*] *J. D.*, a free miner of the *Forest of Dean*, applied for a vacant gale, and his application was duly entered in the books of the gaveller, who thereupon gave notice that a grant of the gale would be made on a particular day.—Other applicants appeared whose claims were disallowed, but the grant of the gale was delayed until the free miner died, when his devisees presented a petition of right claiming to be entitled to a grant of the gale in

FREE MINERS—*continued.*
right of *J. D.*—Demurrer, on the ground that *J. D.* had not acquired a title to the gale, transmissible by will, overruled with costs against the Crown. James *v.* The Queen - - 502

GALES—Free miners—*Forest of Dean* - 502
See Free Miners.

GARNISHEE ORDER—Lunatic—Banking accounts—Box of securities - - 224
See Deposit for Safe Custody.

GENERAL ORDERS, FEB. 1861, r. 19 - 238
See Expenses of Witness.

GENERAL RULES IN BANKRUPTCY, 1870, r. 39
See Debtor's Summons. [454

—— rr. 67, 72, 73 - - - - 575
See Creditor holding Security.

—— r. 260 - - - - - 452
See Execution Creditor.

—— r. 292 - - - - - 61
See Costs of Liquidation.

GENERAL WORDS—Schedule of parcels - 378
See Schedule of Parcels.

GIFT COUPLED WITH DUTY—*Will—Construction—Annuity to Trustee.*] A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee:—*Held* to determine on the cesser of active trusts by the payment of the whole of the trust property to a person absolutely entitled, without a devolution of the office of trustee on any other person. Hull *v.* Christian - - - - - - 546

HUSBAND AND WIFE—Restraint on anticipation - - - - - 409
See Restraint on Anticipation.

—— Will of married woman - - 426
See Will of Married Woman.

ILLEGITIMATE CHILDREN—*Will—Gift to Unborn Illegitimate Children of Testator—Marriage with Deceased Wife's Sister.*] A gift by a testator or testatrix to his or her unborn child by a particular person, not being the wife or husband of the testator or testatrix, is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix.—Where, therefore, a testatrix who has gone through the ceremony of marriage with *P.*, the husband of her deceased sister, bequeathed her residuary estate upon trust for all her children by *P.*, and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:—*Held*, that the second child, having before the death of the testatrix acquired the reputation of being her child by *P.*, was entitled to share in the estate. *In re* Goodwin's Trust - - - - - 345

2. —— *Will—Gift to Children held to apply to reputed Children.*] A testator gave all his real and personal property to his wife, *M. D.*, in trust to apply the same to her own personal use for life, and he left her at liberty to dispose of the property amongst their children by will as she should think fit; and, should she make no will, he desired that the property existing at her death

ILLEGITIMATE CHILDREN—*continued.*
should be divided equally between his children by her. The testator had two illegitimate children by *M. D.*, who were recognised by him and baptised as his children, and he had married her the day before he made his will. There were no children born after the marriage:—*Held*, that the two illegitimate children were the objects of the power of appointment to *M. D.*, and that they would take as the children of the testator by her in default of her executing the power. Dorin *v.* Dorin - - - - - - 463

IMPLICATION—Charge of legacies—Residuary gift - - - - - 405
See Exclusive Appointment.

—— Life estate - - - - 320
See Precatory Trust.

INCOME OR CORPUS—Annuity - - 324
See Annuity charged on Corpus. 1.

INFANT—Ejectment bill by - - 378
See Ejectment Bill by Infant.

—— Next friend - - - - 347
See Next Friend.

INJUNCTION—Action on policy of insurance 85
See Restraining Action on Policy.

—— Bankruptcy - - - - 332
See Injunction in Bankruptcy.

—— Before decree—County Court - - 297
See Injunction by County Court.

—— Contract for raising and selling coal - 132
See Contract for raising Coal.

—— Injury to reputation—Suspension of ship's class - - - - - 190
See Injury to Reputation.

—— Trade-mark - - - - 29
See Trade-mark.

—— Winding-up—Judgment creditor - 268
See Injunction in Winding-up.

INJUNCTION BY COUNTY COURT—*Administration Suit in County Court—Action by Creditor of Intestate—Injunction before Decree—Ex parte Order—County Court Orders in Equity*, 1865, *Ord. I., r.* 8; *Ord. XII., r.* 1.] Notwithstanding that, by Order I., rule 8, of the County Court Orders in Equity, 1865, a decree cannot be made till a month after the plaint has been filed, a County Court Judge has not jurisdiction under Order XII., rule 1, of the County Court Orders in Equity, 1865, in a creditor's administration suit before decree, or on an *ex parte* application, to restrain a creditor's action commenced previously to the institution of the suit. Nokes *v.* Gandy 297

INJUNCTION IN BANKRUPTCY—*Composition—Failure of Debtor to pay—Action by Creditor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] The creditors of two debtors who filed a liquidation petition resolved to accept a composition payable in three instalments, respectively at six, twelve, and eighteen months after the registration of the resolution. The amount of the debt due to one of the creditors was disputed. The first instalment was paid to him upon the sum for which he claimed, and it was agreed that the true amount of his debt should be determined by the Registrar. The creditor did not take any steps to have this amount determined until after the 1st of February, 1873, when the third instalment fell due. The amount of the debt was determined by the Court on the 29th of July, 1873. Some discussion then took place between the solicitors of the parties as to the terms in which the order was to be drawn up, and ultimately, on the 19th of August, the creditor's solicitor wrote a letter assenting to the order as drawn by the debtor's solicitors, in which letter he said: "When the order is signed I shall be glad to know if you are prepared to pay the amount of the composition." The order was signed by the Registrar on the 27th of August. On the 22nd of August the debtors proposed to the creditor that they should pay the balance of the composition due to him, not in cash, but partly in bills and partly in cash. The next day the creditor declined this proposal, and on the 25th made a demand for the full amount of the debt. On the 27th of August the debtors tendered to the creditor the balance of the composition in cash, but he refused to receive it, and on the 29th of August he commenced an action to recover the balance of his debt, after deducting the first instalment which he had received:—*Held* (affirming the decision of the County Court Judge), that it would be inequitable to allow the creditor to proceed with his action, and that he must be restrained from doing so. *Ex parte* King. *In re* Harper - - - - - 332

INJUNCTION IN WINDING-UP — *Company — Voluntary Winding-up — Action by Creditor — Staying Execution—Costs—Companies Act*, 1862, *s.* 138.] Where, after the commencement of a voluntary winding-up, a creditor brings an action and recovers judgment against the company, the Court will, under sect. 138 of the *Companies Act*, 1862, stay execution upon the terms of the creditor being admitted to prove in the winding-up for the amount of his debt, the costs of the action at law, and the costs of the application to stay execution.—*In re Keynsham Company* (33 Beav. 123), *In re Life Association of England* (34 L. J. (Ch.) 64), *In re Peninsular, &c., Banking Company* (35 Beav. 280), and *Ex parte Levick* (Law Rep. 5 Eq. 69), discussed. *In re* Poole Firebrick and Blue Clay Company - - 268

INJURY TO REPUTATION—*Published Registry of Ships—Ship's Class—Injunction.*] Upon motion for an injunction by subscribers to an association called *The Underwriters' Registry*, who had had a ship registered by the association in the highest class, to restrain the Defendants, the committee of the association, from inserting, after a subsequent survey allowed by the Plaintiffs, in their published registry of ships the words "Class suspended" against the Plaintiffs' ship:—*Held*, that the Defendants were justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the Plaintiffs should have altered the ship according to their requirements. Clover *v.* Royden - - - - 190

INSTRUMENT IN WRITING—Transfer of shares —Custom of company - - 273
See Transfer of Shares.

INTEREST—Advances by executor - 554
See INTEREST ON BALANCES.
—— Payment by executor *de son tort*—Statute of Limitations - - - - 71
See LIMITATIONS, STATUTE OF.

INTEREST ON BALANCES—*Will—Administration—Interest allowed to Executor on Advances.*] By the will of a trader, the residue of his real and personal estate, including his stock-in-trade and effects used therein and the goodwill of his business, was bequeathed to a trustee and executor, upon ordinary trusts for sale and conversion. The executor had from time to time out of his own moneys advanced various sums in excess of the balance in his hands.—The Court, in administration, allowed the executor £4 per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances. FINCH *v.* PESCOTT 554

INTERSECTED LANDS—*Railway Company—Right of Way—Level Crossing—Effect of Change in Condition of Land.*] A railway company taking land compulsorily contracted to make communications by level crossings between two severed portions of an estate. The estate then consisted of marsh or mud land, and was subject to a statutory prohibition against being built upon. The prohibition having been afterwards removed, and the land becoming applicable for building purposes:—*Held*, that a right of way over, under, or across a railway was *primâ facie* general, and not restricted to purposes to which the land was applicable at the time the right arose, and the right being unrestricted in terms gave the owners and occupiers of the land the use of the level crossings for all purposes connected with houses or buildings subsequently erected or to be erected on the estate, but not so as to obstruct the proper working of the railway. UNITED LAND COMPANY *v.* GREAT EASTERN RAILWAY COMPANY - - - - - - 158

INVESTMENT—Power of trustees—Administration suit - - - - - 24
See MANAGEMENT BY TRUSTEES.
—— Purchase-money — Land Tax Redemption Act - - - - - 156
See REINVESTMENT OF PURCHASE-MONEY.

JUDGMENT—Court of Chancery—Power to antedate—Death of Plaintiff after hearing
See NUNC PRO TUNC. [561
—— Injunction against judgment creditor—Winding-up - - - 268
See INJUNCTION IN WINDING-UP.
—— Mortgaged estate — Law of Judgments Amendment Act - - - 435
See JUDGMENT CREDITOR.

JUDGMENT CREDITOR—*Elegit—Equity of Redemption—Bill by Judgment Creditor for Redemption and Foreclosure—Law of Judgments Amendment Act* (27 & 28 *Vict.* c. 112), *ss.* 1, 4.] On a bill filed against mortgagees and mortgagor, who was also a judgment debtor, by a judgment creditor who had issued a writ of elegit against the goods and hereditaments of the judgment debtor, but the execution of which, in consequence of the mortgages, could not be proceeded with, for accounts, redemption, and foreclosure, the ordinary

JUDGMENT CREDITOR—*continued.*
redemption and foreclosure decree was made, notwithstanding the provisions of the statute 27 & 28 Vict. c. 112. BECKETT *v.* BUCKLEY - 435

JURISDICTION—Charity Commissioners - 241
See CHARITY COMMISSIONERS.
—— County Court—Equitable jurisdiction 343, [415
See COUNTY COURT JURISDICTION. 1, 2.
—— County Court—Injunction before decree 297
See INJUNCTION BY COUNTY COURT.
—— Injunction to restrain sale of coal - 132
See CONTRACT FOR RAISING COAL.
—— Rectification of register — Companies Act, 1862, s. 35 - - - - 273
See RECTIFICATION OF REGISTER.

LABEL—Trade-mark—"Nourishing Stout" 29
See TRADE-MARK.

LEASE—Covenant not to assign—Underlease with like provisions - - - 549
See COVENANT NOT TO ASSIGN.
—— Mine—Mode of working—Evidence of custom - - - - - 358
See MINING LEASE.

LEGACY—Free of legacy duty—Deficiency of residue - - - - - 419
See LEGACY DUTY.
—— Repetition of - - - - 50
See CUMULATIVE GIFTS.

LEGACY DUTY—*Administration — Costs—Residue.*] Testator gave certain legacies free of legacy duty, simpliciter, and other legacies free of legacy duty, with a direction that the duty should be paid out of his residuary estate. The *corpus* of the legacies and the duty having been paid, it was ascertained that the estate was deficient, so that there was no residue available for payment of the duty directed to be thereby borne:—*Held*, that the gift of duty out of the residuary estate failed *pro tanto*, and that the legatees whose legacy duty was to be borne by the residuary estate must themselves bear the legacy duty to the extent to which the general personal estate was insufficient to pay the same. WILSON *v.* O'LEARY - 419

LETTER OF HYPOTHECATION—Bill of lading [205
See SECURITIES FOR BILLS OF EXCHANGE.

LEVEL CROSSING—Intersected lands—Right of way—Change in condition of land 158
See INTERSECTED LANDS.

LIEN—Annuity—Real estate—Arrears — Power of distress - - - 324, 495
See ANNUITY CHARGED ON CORPUS. 1, 2.
—— Bankers—Deposit of box of securities 224
See DEPOSIT FOR SAFE CUSTODY.
—— Policy of insurance—Premium paid by mortgagee - - - - 316
See LIEN ON POLICY MONEY.
—— Solicitor—Charge on property recovered 222
See SOLICITOR'S LIEN.

LIEN ON POLICY MONEY—*Mortgage—Payment of Premiums by Mortgagees—Salvage—Lien—Interest.*] A policy of assurance on the life of *G.*, granted to a trustee for her, was assigned to trustees, upon trust to invest the proceeds at the death

LIEN ON POLICY MONEY—*continued.*
of *G.* for the benefit of *C.* for life, for her separate use, without power of anticipation, and after her death upon trusts as she should appoint, and in default of appointment for the persons who would be entitled to her personal estate. The trustees had power to pay the premiums. Notice was given to the assurance company of the assignment. *C.* subsequently, by a deed to which *G.* was a party, appointed the policy and the moneys to become due thereon to the Plaintiffs to secure the repayment of moneys (with interest at 5 per cent.) advanced to *G.* for the benefit of herself and *C.* and children. Notice was given to the surviving trustee of the settlement and to the assurance company. The Plaintiffs had, in consequence of the trustee and others interested in the policy refusing to pay them, paid the premiums and kept the policy on foot. On the death of *G.* the assurance company paid the policy moneys to the trustees, who refused to pay the Plaintiffs the sums due to them. The policy moneys were afterwards paid into Court.—On bill filed by the Plaintiffs:—*Held*, that they were entitled to be repaid at once the moneys which they had advanced for the payment of the premiums with interest at 4 per cent., and 1 per cent more on the death of *C.* Gill *v.* Downing - - 316

LIFE INSURANCE—Premiums paid by mortgagee - - - - 316
See Lien on Policy Money.

LIQUIDATION BY ARRANGEMENT—Duties of trustee—Audit of accounts - 457
See Trustee in Liquidation.

—— Superseded by bankruptcy - - 61
See Costs of Liquidation.

LIMIT OF VALUE—Jurisdiction of County Court
See County Court Jurisdiction. [415

LIMITS OF DEVIATION—Compulsory powers—Notice of application to Parliament 476
See Compulsory Powers. 3.

LIMITATIONS, STATUTE OF—*Creditor's Suit—Lapse of Time—Absence of Personal Representative—Acknowledgment of Debt—Executor de son Tort—Costs.*] A testator being, at the time of his death in 1857, indebted to *B.* on simple contract, gave by his will his real and personal estate to his wife for life, and appointed *J.* and *E.* executors. The will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the will was proved, and then *B.* filed his bill on behalf of himself and other creditors against the widow and the executors:—*Held*, that the claim was barred by the *Statute of Limitations*, and that the bill must be dismissed with costs. Boatwright *v.* Boatwright - 71

LOCAL BOARD—Towns improvement—Power to take property—Scheduled lands - 524
See Compulsory Powers. 4.

LOCKE KING'S ACT (17 & 18 *Vict. c.* 113); 30 & 31 *Vict. c.* 69—*Will—Mortgaged Estate—Direction for Payment of Debts—Exoneration—Specific Devise.*] A testator, who was entitled to an estate subject to a mortgage, devised part of it for the benefit of his widow for life, and the remainder to his residuary devisee, and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate:—*Held*, that no contrary or other intention was shewn within the meaning of *Locke King's Act*, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage.—*Brownson* v. *Lavrance* (Law Rep. 6 Eq. 1) questioned. Sackville *v.* Smith - - - - - - 153

LUNACY—Banking account—Garnishee order
See Deposit for Safe Custody. [224

MAJORITY OF CREDITORS—*Composition—Acceptance of Composition—Subsequent Resolution of Creditors to reduce the Amount of Composition—Rights of Dissentient Creditor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71, *s.* 126).] The provision of sect. 126 of the *Bankruptcy Act*, 1869, that "the creditors may by an extraordinary resolution add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation," enables the creditors to reduce the amount of the composition previously accepted by them, and to bind a dissentient creditor to the same extent as he was bound by the original resolution.—The word "persons" in the above clause is used in contradistinction to the word "creditors." *Ex parte* Radcliffe Investment Company. *In re* Glover - - - 121

MANAGEMENT BY TRUSTEES—*Administration Decree—Powers of Management—Discretion of Trustees—Investment—Control by Court.*] After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the Court; and the Judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees.—Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—*Held*, that if the trustees had the discretion they claimed (which was doubtful), the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. Bethell *v.* Abraham - - 24

MARINE INSURANCE—Hypothecation of policy [205
See Securities for Bills of Exchange.

—— Suit to restrain action and deliver up policy - - - - 85
See Restraining Action on Policy.

MARRIAGE SETTLEMENT—Covenant for future settlement—Bankruptcy - - 115
See Covenant to settle.

MARSHALLING—*Administration—Specific Devise—Residuary Realty—Deficient Estate—Contribution.*] In the administration of the estate of a testator whose personal assets are deficient, specifically devised estates are not liable to con-

MARSHALLING—*continued.*
tribute towards meeting the deficiency until the residuary real estate has been exhausted. Lancefield *v.* Iggulden - - - - 556

MATE OF SHIP—Receipts for goods—Property in goods—Local custom - - 92
See Property in Goods shipped.

MEMORANDUM OF ASSOCIATION—Subscriber—Paid-up shares - - - 169
See Subscriber of Memorandum.

MINE—*Forest of Dean*—Free miners—Gales 502
See Free Miners.

—— Lease—Mode of working—Evidence of custom - - - - 358
See Mining Lease.

MINERALS—Compensation for—Damage by severance—Waterworks Clauses Act, 1847
See Compulsory Powers. 3. [476

MINING LEASE—*Coal Mines—Covenant by Lessees—Mode of Working—Working Seams in Consecutive Order—Evidence of Custom—Bill for Injunction.*] By a lease of collieries in *Cheshire*, certain pits or mines, comprising the *T.* mine, which was the uppermost, the *B.* mine, which was the next, and the *C.* mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect.—On a bill by the lessor, alleging that the Defendants, after having for some time worked the said three mines, had ceased working the *T.* mine, and also that they were working the *C.* mine in advance of the *B.* mine, and praying injunctions accordingly:—*Held*, that, under the terms of the covenant, the Defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the Court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the Defendants were committing a breach of the covenant; and the bill was dismissed with costs. Lord Abinger *v.* Ashton - - - - 358

"**MONEY**"—*Will—Construction—"Money due at my Decease"—Unliquidated Damages.*] A bequest of "all and every sum or sums of money which may be due to me at my decease" will pass damages recovered in an action by the executor for a breach of covenant committed in the lifetime of the testator. Bide *v.* Harrison - - 76

MONEY AT BANK—Savings of separate estate
See Will of Married Woman. [426

MORTGAGE—Administration suit by mortgagee—Costs - - - - 421
See Costs of Administration Suit.

—— Costs—Mortgage under £1000—Higher or lower scale - - - 543
See Taxation of Costs.

—— Costs in suit—Sum under £500 - 343
See County Court Jurisdiction. 1.

MORTGAGE—*continued.*
—— Deposit of deeds - - - 15
See Priority lost by Negligence.

—— Foreclosure suit—Decree for sale - 425
See Foreclosure Suit.

—— Foreclosure suit—Transfer of mortgage after certificate—Revivor and supplement - - - - - 14
See Revivor and Supplement.

—— Judgment creditor—Law of Judgments Amendment Act - - - 435
See Judgment Creditor.

—— Policy of assurance—Premiums paid by mortgagee - - - - 316
See Lien on Policy Money.

—— Priority—Negligence - - - 15
See Priority lost by Negligence.

—— Share in company—Deposit of certificates—Blank transfer - - - 273
See Transfer of Shares.

—— Tenant for life—Grant of rent-charge—Apportionment - - - 283
See Apportionment of Rent. 1.

NEGLIGENCE—Mortgage—Priority - 15
See Priority lost by Negligence.

NEXT FRIEND—*Practice—Suit by Infant—Death of Next Friend—Appointment of New Next Friend—Paternal Relations of Infant—Affidavit of Fitness.*] Where the next friend of an infant Plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend; and their nominee may obtain orders of course in the suit changing the solicitors on the record and appointing himself next friend.—In such a case the order appointing the new next friend need not be supported by any affidavit as to his fitness. Talbot *v.* Talbot - - - 347

NOTICE—Application to Parliament—Compulsory powers—Limits of deviation - 476
See Compulsory Powers. 3.

—— Bill of lading—Equitable assignment of goods - - - - - 92
See Property in Goods shipped.

—— Constructive—Negligence - - 15
See Priority lost by Negligence.

NOTICE TO TREAT—Towns improvement—Local board of health—Scheduled lands 524
See Compulsory Powers. 4.

NUNC PRO TUNC—*Death of Plaintiff after Hearing.*] Where a Plaintiff dies after hearing, but before judgment, the Court has jurisdiction to date the judgment as of the date of the hearing. Turner *v.* London and South-Western Railway Company - - - - - 561

ORDER AND DISPOSITION—*County Court Appeal—Goods of Intestate—Bankruptcy of Administratrix—Laches.*] The holders for value of an unregistered bill of sale of certain goods supplied to an innkeeper for use in his business allowed them to remain in the hands of his administratrix after his death. She continued the business, and remained in possession of the goods for fifteen months after taking out letters of administration to him, at the end of which time she became bankrupt:—*Held*, first, that the goods were in the order and disposition of the bank-

ORDER AND DISPOSITION—*continued.*
rupt with the consent of the true owners:—Secondly, that independently of the bill of sale the lapse of more than a year, during which the goods were in the hands of the administratrix and used by her for the purposes of her business, precluded any claim as against her creditors by the creditors of the estate of which she was administratrix. Kitchen *v.* Ibbetson - 46

2. —— *Chose in Action—Shares not standing in Bankrupt's Name, but in which he has an Equitable Interest—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] A bankrupt, before his bankruptcy, agreed to give, as security for a debt which he owed, his interest in some shares in a joint stock company which were already subject to a prior mortgage. At the commencement of the bankruptcy the shares were registered in the name of the first mortgagee. It was not satisfactorily proved that notice of the second mortgage had been given to the first mortgagee:—*Held*, that the bankrupt's interest in the shares at the time of the bankruptcy was a *chose in action*, and was therefore not, under sect. 15 of the *Bankruptcy Act*, 1869, in the order or disposition of the bankrupt, and consequently that, subject to the first mortgage, the second mortgagee was entitled to the shares to secure his debt. *Ex parte* Barry. *In re* Fox - 113

PARCELS—Schedule of - - - 378
See Schedule of Parcels.

PAROL VARIATION—Statute of Frauds - 303
See Collateral Agreement.

PARSONAGE HOUSE—Improvements and repairs—Reinvestment of purchase-money 156
See Reinvestment of Purchase-money.

PARTIES—Suit against executor *de son tort*—Legal personal representative - 20
See Executor de son Tort.

PAYMENT INTO COURT—Lands Clauses Act—Costs - - - - 340
See Costs under Lands Clauses Act.

PAYMENT OUT OF COURT—*Practice—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 69—*Tenant in Tail—Disentailing Deed.*] Where a fund paid into Court under the *Lands Clauses Consolidation Act*, 1845, is claimed on petition by a person who would have been the tenant in tail of the land represented by the fund, it is unnecessary for him to execute a disentailing deed as a condition of having the fund paid out to him. *In re Butler's Will* (Law Rep. 16 Eq. 479) not followed. *In re* Row - - - 300

2. —— *Practice—Order for Payment—Death of Party named in the Order—Payment to Representatives—Chancery Funds Rules*, 1872, *r.* 22.] By an order made in 1827 part of the dividends of a fund in Court was ordered to be paid to *A.* during the life of *B.* *A.* died in 1873 in the lifetime of *B.*:—*Held*, that under the Chancery Funds Rules, 1872, r. 22, the executor of *A.*, though not named in the order, was entitled to have the future dividends paid to him without any fresh order being made. Chapman *v.* Chapman - - - - - - 350

PETITION OF RIGHT—Free miners—*Forest of Dean* - - - - - 502
See Free Miners.

PLEDGE—Shares in company - - 273
See Transfer of Shares.

POLICY OF INSURANCE—Hypothecation of 205
See Securities for Bills of Exchange.
—— Premiums paid by mortgagee - - 316
See Lien on Policy Money.
—— Suit to restrain and deliver up policy 85
See Restraining Action on Policy.

POWER—Appointment—Married woman - 8
See Appointment by Married Woman.
—— Appointment—Non-exclusive residuary gift
See Exclusive Appointment. [405
—— Appointment—Precatory trust - 320
See Precatory Trust.
—— Sale and exchange—Act of Parliament 378
See Schedule of Parcels.
—— To appoint new trustees — Trustees for sale - - - - - 351
See Power to appoint New Trustees.

POWER TO APPOINT NEW TRUSTEES—*Will—Power of Sale—Appointment of Tenant for Life—Title—Vendor and Purchaser.*] Testator devised his real estate to trustees, in trust for his wife for life, with remainder to *F.* for life, with remainders over, and with a power of sale, at the discretion of the trustees or trustee for the time being, and with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed the testator's widow and *F.* new trustees jointly with himself. *F.* being sole surviving trustee contracted for the sale of part of the property:—*Held*, that the power to appoint new trustees had been well exercised, there being nothing in the will to prevent the appointment of a tenant for life as trustee; and that *F.* could make a good title to the property, which the Court would enforce upon a purchaser. Forster *v.* Abraham - 351

PRACTICE—Affidavit sworn abroad - 439
See Affidavit sworn Abroad.
—— Foreclosure suit—Sale - - 425
See Foreclosure Suit.
—— Injunction before decree—County Court 297
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—— Next friend—Choice of - - 347
See Next Friend.
—— *Nunc pro tunc*—Antedating judgment 561
See Nunc pro Tunc.
—— Parties—Administration suit—Executor *de son tort* - - - - - 20
See Executor de son Tort.
—— Payment out of Court - - 300, 350
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—— Production of documents - 402, 517
See Production of Documents. 1, 2.
—— Revivor and supplement - - - 14
See Revivor and Supplement.
—— Security for costs - - - 430
See Security for Costs.
—— Service out of jurisdiction - - 432
See Service out of Jurisdiction.

PRACTICE—*continued.*
—— Taxation of costs - - - 543
See Taxation of Costs
—— Witness—Expenses—Cross-examination out of jurisdiction - - - 238
See Expenses of Witness.

PRECATORY TRUST—*Will—Construction—Life Interest—Power of Appointment.*] Testator appointed his wife sole executrix, and left to her all his property, landed and personal, of every description, for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children, during her lifetime and at her decease, doing equal justice to all of them:—*Held*, that the wife took a life interest, with a power of appointment amongst the children as she might think fit. Curnick *v.* Tucker - - 320

PREFERENTIAL DEBTS—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Wages and Salaries—Intended Prosecution of Debtor under the Debtors Act*, 1869—*Right of Trustee to retain Funds to meet Costs.*] Proofs were made against the estate of a liquidating debtor in respect of sums due for wages and salaries, entitled to priority under sect. 32 of the *Bankruptcy Act*, 1869. The trustee deposed that he intended to prosecute the debtor under the *Debtors Act*, 1869, and that he desired to examine him as to his affairs, and claimed the right to retain the funds in his hands, which were small, to meet costs:—*Held*, that the preferential creditors were entitled to immediate payment. *Ex parte* Powis. *In re* Bowen. - - 130

PREMIUMS PAID BY MORTGAGEE - 316
See Lien on Policy Money.

PRIORITY—Administration suit by mortgagee—Costs - - - - - 421
See Costs of Administration Suit.
—— Mortgage—Negligence - - 15
See Priority lost by Negligence.

PRIORITY LOST BY NEGLIGENCE—*Mortgage—Equitable Deposit—Marriage Articles—Purchaser for Value—Notice—Inquiry as to Deeds—Legal Estate.*] *L.*, the owner of real estate, deposited the title-deeds with his bankers to secure the balance of his account current, and executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Afterwards, being about to be married, he agreed to settle the property. Two days before the marriage the solicitor of the intended wife, having only then received instructions to prepare articles of settlement, inquired of *L.* whether he had the title-deeds in his possession unincumbered; he replied that he had, but that they were at his bankers. The solicitor made no further inquiry, and prepared articles of settlement, which were executed. After the marriage *L.* conveyed the property to the trustee of the articles upon the trusts therein contained, being for the benefit of the wife and issue of the marriage. A suit was afterwards instituted by the bankers for foreclosure; and the wife claimed to be a purchaser for value without notice:—*Held*, that the solicitor had not made sufficient inquiry, and that the wife must be taken to have had constructive notice of the mortgage:—*Held*, also, that the husband having contracted to execute a

PRIORITY LOST BY NEGLIGENCE—*continued.*
legal mortgage to his bankers, could not deprive them of priority by conveying the property to a party with whom he had entered into a subsequent contract for value, even although such party was a purchaser without notice.—The decision in *Sharples* v. *Adams* (32 Beav. 213) approved of, but *dictum* therein questioned. Maxfield *v.* Burton - - - - - 15

PRIVATE RIGHT—Public inconvenience—Railway company - - - 561
See Right to stop Train.

PRIVILEGED COMMUNICATION—*Bill of Costs—Matters of Fact—Ante litem motam—Practice.*] A claimant, who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked on cross-examination, whether the obstacles were suggested by him to his solicitor, or by his solicitor to him:—*Held*, not bound to answer, though the communication was before any litigation was in contemplation.—The bill of costs delivered in the same matter also held to be privileged. Turton *v.* Barber - - 329

PRO CONFESSO—Foreclosure suit—Absent mortgagor—Decree for sale - - 425
See Foreclosure Suit.

PRODUCTION OF DOCUMENTS — *Practice - - Further Affidavit—Reasonable Suspicion.*] The Court will order a further affidavit as to documents to be made by a Defendant, if it is satisfied from the admissions in the Defendant's answer that material documents not mentioned in his affidavit may be in his possession, even although the answer does not in express terms admit the existence of such documents.—Where a Defendant by his answer set out a long list of customers of a business carried on by him, but did not mention in his affidavit as to documents any books relating to such business:—*Held*, that the Defendant must make a further affidavit.—*Noel* v. *Noel* (1 D. J. & S. 468) and *Wright* v. *Pitt* (Law Rep. 3 Ch. 809) considered. Saull *v.* Browne - - 402

2. —— *Comparison of Handwriting—Cheques—Signatures alleged to be Forgeries.*] In a suit in which the genuineness of the signature of a testator to a certain document was one of the issues to be tried, the Defendant was ordered to produce on affidavit any cheques in his possession signed by the testator between specified dates. The Defendant produced a great number of cheques, stating in his affidavit that they were all the cheques in his possession signed by the testator, but that he had other cheques drawn on the testator's bankers, which he did not produce because they were forgeries:—*Held*, that the Plaintiffs were not entitled to any further particulars, or to production of the cheques alleged to be forged.—*Quære*, whether a document required only for comparison of handwriting is a relevant document which a Defendant is bound to specify or produce. Wilson *v.* Thornbury - - - 517
—— Bill of costs—Communication before litigation - - - - - 329
See Privileged Communication.

PROOF OF DEBT—Bankruptcy—Secured creditor—Production of security - - 575
See Creditor holding Security.

PROPERTY IN GOODS SHIPPED—*Shipping Documents—Bill of Lading—Mate's Receipt for Goods—Equitable Assignment—Notice—Local Custom of Trade.*] The master of a vessel may properly sign bills of lading in favour of the shipper of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel, and has no notice that any one but the shipper claims any interest in them. —The holder for value of bills of lading so given has a better title than an indorsee of the mate's receipts.—A local custom of trade was alleged to exist at *Bombay* by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading, and that masters of ships are bound to have the mate's receipt returned to them before signing any bill of lading for the goods mentioned in that receipt, and that if a captain signed a bill of lading without production and delivery to him of the mate's receipt for the goods, he would be bound, on the production of that receipt, to sign a fresh bill of lading, and to deliver the same to the person producing the mate's receipt, and that the goods mentioned in the receipt ought to be delivered to the person who produced the second bill of lading:—*Held*, that such a custom, if proved to exist, would be inoperative as against the captain and the shipowners. Hathesing *v.* Laing. Laing *v.* Zeden - - - - - 92

PROSECUTION UNDER DEBTORS ACT, 1869—Costs—Right of trustee to retain funds
See Preferential Debts. [130

PUBLIC INCONVENIENCE — Private right — Railway company - - - 561
See Right to stop Train.

PURCHASE-MONEY — Land Tax Redemption Act—Reinvestment - - 156
See Reinvestment of Purchase-money.

RAILWAY COMPANY—Costs—Money paid into Court - - - - 340
See Costs under Lands Clauses Act.

—— Intersected lands—Level crossing—Right of way - - - - - 158
See Intersected Lands.

—— Notice to treat - - - 142, 217
See Compulsory Powers.

—— Right to stop train—Ordinary trains - 561
See Right to stop Train.

—— Unregistered—Incorporated by Act of Parliament—Winding-up - - 181
See Winding-up Petition. 2.

RECITALS—Act of Parliament—Settled estates—Schedule - - - - 378
See Schedule of Parcels.

—— Voluntary settlement—False recital of payment of money - - - 8
See Voluntary Settlement.

RECTIFICATION OF REGISTER—*Jurisdiction—Companies Act*, 1862.] Where a person claiming shares under a legal title applies under sect. 35 of the *Companies Act*, 1862, to have the register of a company rectified, the Court has jurisdiction to decide a question of title between him and another person claiming to be entitled to the shares, but has no jurisdiction to order costs to be paid by such third party. Nor (*semble*) has the Court jurisdiction to make an order under that section where the title of the applicant is equitable only. *In re* Tahiti Cotton Company. *Ex parte* Sargent - - - - - - 273

REGISTER—Rectification of - - 273
See Rectification of Register.

REGISTRATION—Bill of sale - - 578
See Registration of Bill of Sale.

—— Grant of gale—*Forest of Dean* - 502
See Free Miners.

REGISTRATION OF BILL OF SALE—*Bill of Sale—Validity—Defeasance or Condition—Registration—Possession—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 2] A bill of sale of furniture was given to secure the payment of £250 and interest, the money being made payable on demand. In default of payment on demand the mortgagee was empowered to take possession. The bill of sale was registered within the proper time. There was a prior parol agreement, not appearing in the bill of sale, that the debt should be paid off by small weekly instalments. The mortgagor was adjudicated a bankrupt, but before the adjudication was made the mortgagee had taken possession:—*Held*, that this parol agreement amounted to a defeasance or condition within the meaning of sect. 2 of the *Bills of Sale Act*, 1854; and that, as the agreement was not registered, the bill of sale was void as against the trustee under the bankruptcy. *Ex parte* Southam. *In re* Southam - - - - 578

REGISTRY—Underwriters— Ship's class —Suspension of class - - - 190
See Injury to Reputation.

REINVESTMENT OF PURCHASE-MONEY — *Land Tax—Redemption—Sale of Lands—Investment of Surplus—Proceeds of Sale—Repairs and Improvements*—42 *Geo.* 3, *c.* 116, *s.* 100.] The *Land Tax Redemption Act* (42 Geo. 3, c. 116), s. 100, provides that surplus moneys arising from a sale made to redeem land tax may be applied in the discharge of any debt affecting the hereditaments, the land tax whereon shall have been redeemed, or may be invested in the purchase of other lands to be settled to the like uses:—*Held*, that where a portion of the glebe lands of a vicarage had been sold to redeem the land tax, the surplus moneys could not be applied towards repairs and improvements of the vicarage house. *In re* Nether Stowey Vicarage - - 156

RELEASE—Interest on debt—Will—Ademption
See Ademption. [65

RENT—Apportionment of - - 283, 288
See Apportionment of Rent. 1, 2.

—— Arrears of—Sale of land charged - 437
See Arrears of Rent-charge.

REPAIRS—Investment in—Parsonage house 156
See Reinvestment of Purchase-money.

REPUTATION — Illegitimate children — Paternity - - - - - 463
See Illegitimate Children. 2.

—— Injury to—Suspension of ship's class 190
See Injury to Reputation.

RESIDUARY GIFT — *Residue of Specific Fund —Abatement.*] By deed and by will two funds of £37,914 and £800 Consols were settled, with powers of varying investments, upon trust for the nephews and nieces of *R. H.* subject to a power in *R. H.* of exclusive appointment among them. *R. H.* made and revoked a series of appointments, and ultimately, by a deed-poll in November, 1870 (at which time the fund had been reduced to £27,170 Consols and £8000 cash), *R. H.*, after reciting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named in the shares and proportions and in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7000 Consols, part of the £37,914 and £8000 Consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, *S. H.* absolutely. *R. H.* then appointed in like manner further sums (making an aggregate of £37,000 Consols), in trust for the four nieces and nephew named; and the residue of the two several sums of Consols or other the stocks, funds, or securities, &c., in trust for his niece *C.* The trust funds at the death of *R. H.* were insufficient to pay the £37,000 Consols:—*Held*, that the gift to *C.* was residuary and not specific, and that it failed altogether. DE LISLE *v.* HODGES - 440

—— Non-exclusive power of appointment - 405
See EXCLUSIVE APPOINTMENT.

RESIDUE—Direction to pay legacy duty out of—
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See LEGACY DUTY.

—— Realty—Marshalling assets - - 556
See MARSHALLING.

—— Specific fund—Residue of - - 440
See RESIDUARY GIFT.

RESTRAINING ACTION ON POLICY—*Fraud—Jurisdiction—Injunction—Suit to restrain Action at Law, and to obtain Delivery Up and Cancellation of Policies—Proceedings stayed till after Trial of Action—Verdict for Defendant at Law—Costs of Suit.*] Two actions were brought by the same Plaintiff against an insurance company upon two marine insurance policies. After issue had been joined an order was made at law staying one action until the other had been tried, on the terms of the Defendants at law being bound in both by the result of the one which should be tried. But the Plaintiff at law was not to be bound. The company, who resisted payment upon the allegation that the policies had been obtained by fraud, afterwards filed a bill in equity to restrain the actions, and to have the policies delivered up and cancelled. No injunction was moved for. An order was made in the suit staying the proceedings until after the decision of the action. Ultimately the action which was tried was decided in favour of the company, on the ground that the policy had been obtained by fraud. The Plaintiff at law then delivered up both policies to the company. Upon the suit coming on for hearing:—

RESTRAINING ACTION ON POLICY—*continued. Held*, that a decree must be made for cancellation of both policies; and that the Defendants must pay the costs of the suit. LONDON AND PROVINCIAL INSURANCE COMPANY *v.* SEYMOUR - 85

RESTRAINT ON ANTICIPATION — *Married Woman—Bequest of Consols absolutely.*] Where a fund producing income is given absolutely to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture.—A testatrix, by her will, gave to a married woman a sum of consols; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into Court under the *Trustee Relief Act*, and the married woman presented a petition for a transfer of the fund to herself:—*Held*, that she could only have the income paid to her during her coverture.—As to the effect of a clause restraining anticipation on an absolute gift of a fund not producing income, *quære*. *In re* ELLIS' TRUSTS - - - - - - 409

REVIVOR AND SUPPLEMENT—*Practice—Foreclosure Suit—Order of Revivor and Supplement after Chief Clerk's Certificate*—15 & 16 *Vict. c.* 86, *s.* 52.] In a foreclosure suit, after decree for sale, and after the Chief Clerk's certificate, the Plaintiffs transferred the mortgage.—On an *ex parte* application by the transferee with the consent of the original mortgagees, an order of revivor and supplement was made under 15 & 16 Vict. c. 86, s. 52. BIBBY *v.* NAYLOR - - - 14

RIGHT TO STOP TRAIN—*Railway Company—Ordinary Trains—Death of Plaintiff before Judgment—Nunc pro tunc—Practice.*] Where a Branch Railway Act gave a landowner the right to stop by signal all ordinary trains:—*Held*, that accelerated trains forming part of fast through trains from *London* were not "ordinary" trains, though the fares charged were at the ordinary rate.—Where an Act confers upon a landowner a private right creating a burden upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly.—Where a Plaintiff dies after hearing but before judgment the Court has jurisdiction to date the judgment as of the date of the hearing. TURNER *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY - - - - 561

SALE—Execution creditor - - - 452
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—— Foreclosure suit—Absence of mortgagor 425
See FORECLOSURE SUIT.

—— Land charged with annuity—Bill for sale [495
See ANNUITY CHARGED ON CORPUS. 2.

—— Land charged with chief rent - - 437
See ARREARS OF RENT-CHARGE.

SAVINGS OF SEPARATE ESTATE—Will 426
See WILL OF MARRIED WOMAN.

SCHEDULE OF PARCELS—*Settled Estates—Act of Parliament, Construction of—Recitals—Parcels—General Words.*] Where an Act of Parliament giving powers of sale and exchange over settled estates contained a recital of the object of the Act, which was restricted in terms to such settled estates, and then vested in trustees all and singular the lands in certain counties, limited by a settlement and former Act of Parliament, which were described in the schedule, together with the appurtenances belonging thereto, or therewith occupied or known, as part thereof:—*Held*, that lands not included in the settlement or former Act, though described in the schedule and in the same occupation, did not pass.—Where another Act of Parliament giving powers of sale and exchange over settled estates, expressly vested in the trustees for sale all the scheduled lands (which comprised other lands besides the settled estates), and declared that until sale the lands should be enjoyed by the persons who would have been entitled but for the Act, and that the lands to be purchased should be conveyed and settled to the uses and subject to the powers, restrictions, &c., to which they would have been subject but for the Act:—*Held*, that the words were to be read distributively, and that the person who would have been entitled to the unsettled lands before the Act was still entitled in equity. Howard *v.* Earl of Shrewsbury - - - - 378

SCHOOL— Transfer to School Board — Charity Commissioners - - - 241
See Charity Commissioners.

SECURITIES FOR BILLS OF EXCHANGE—*Mercantile Law—Letter of Hypothecation of Bill of Lading—Insurance Policy Moneys—Bill of Exchange—Agreement by Holders not to present the Bill at Maturity—Effect on the Liability of the Drawer.*] A shipper at *Bombay* having consigned goods to merchants in *England*, drew on them for £1200, and insured the goods for £1700. He sold the draft to the Defendants, a bank, and handed them at the same time the policy of insurance and the bills of lading, with a letter of hypothecation signed by him. This letter stated that the shipper, having sold the bills to the bank, and having at the same time handed to them, "as collateral securities for the due payment of" the bill, "the bills of lading and shipping documents of the several goods stated at foot," thereby authorized the bank, "on default being made in acceptance on presentment, or in payment at maturity" of the bill, to sell the goods and apply the proceeds in payment of the bill; "the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank." The only documents stated at foot were the bill of exchange and the bill of lading. The ship was burnt at sea and the cargo lost. The draft for £1200 was duly accepted, but the acceptors failing, it was dishonoured at maturity. The bank recouped themselves out of the policy moneys which had been paid to them by the insurance office, and had a balance in their hands. This balance having been claimed by the Plaintiffs, who were assignees for value of it from the shipper, the bank claimed it as a collateral security for a debt due to them from the shipper on another

SECURITIES FOR BILLS OF EXCHANGE—*continued.*
account. He had shipped goods to other consignees, and had drawn against the goods bills, which were also in the hands of the same bank. When the bills fell due, the drawees had requested the bank to defer presentment of the bills. The bills had not been presented, but the goods had been sold at a loss, and the bank had re-drawn upon the shipper for the deficiency; but he had failed:—*Held*, that the letter of hypothecation did not extend to any other liability of the shipper to the bank than that arising upon the £1200 bill:—*Held*, further, that the bank, having, at the request of the drawees, refrained from presenting the bills, had practically given them time, and had thus released the drawer, and that the shipper was not indebted to the bank on this account:—*Held*, on both grounds, that the Plaintiffs were entitled to the surplus in the hands of the bank. Latham *v.* Chartered Bank of India - 205

SECURITY FOR COSTS—*Practice.*] An officer in Her Majesty's army named as obligor in a bond of security for costs is not an insufficient surety from his regiment being at the time quartered in *Scotland*. Miller *v.* Hales - - - 430

SEIZURE AND SALE—Execution creditor 452
See Execution Creditor.

SEPARATE ESTATE—Savings of—Will—Money at bank - - - - 426
See Will of Married Woman.

SEPARATE USE—Restraint on anticipation 409
See Restraint on Anticipation.

SERVICE—Motion to set aside award - 476
See Submission to Arbitration.

—— Out of jurisdiction - - - 432
See Service out of Jurisdiction.

SERVICE OUT OF JURISDICTION—*Practice—Cons Ord. x., r. 7.*] In a suit to obtain relief against a domiciled Scotchman living at *Glasgow* in respect of certain transactions relating to Plaintiff company, which was registered and carried on business in *England*, and to restrain his dealing with the shares of the company in his possession, the Defendant was served at his office in *Glasgow* under an order obtained *ex parte* for service of copy bill with interrogatories upon him "in *Scotland* or elsewhere out of the jurisdiction of this Court":—*Held*, that, having regard to the subject-matter of the suit (shares in a company registered in this country), service out of the jurisdiction had been properly directed, and that, although the order was in terms irregular, the Court would not, after it had been acted upon and service effected under it, discharge it on the ground of such irregularity. Phospho-Guano Company, Limited, *v.* Guild - 432

SETTLED ESTATES—Act of Parliament—Recitals—Parcels - - - 378
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—— Paid-up—Contract for—Companies Act, 1867, s. 25 - - - - 169
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—— Subscriber of memorandum - - 169
See Subscriber of Memorandum.
—— Transfer—Donee of power of appointment by deed—Execution of power - 8
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SOLICITOR'S LIEN—*Solicitor—Costs of establishing Infant's Title under* 25 & 26 *Vict. c.* 67—*Costs of Partition Suit—Lien on Fund.*] The costs of proceedings under the *Declaration of Titles Act* on behalf of an infant, together with the costs of a partition suit and of a suit to obtain a declaration of lien:—*Held*, to be costs for which the solicitor had a lien on the fund recovered. Pritchard *v.* Roberts - - - 222
SPECIFIC DEVISE—Exoneration—Locke King's Act - - - - - 153
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—— Marshalling assets - - - 556
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28 & 29 Vict. c. 99, s. 9—*County Courts* [415
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SUBMISSION TO ARBITRATION—*Award—Limit of Time for Complaint — Last Day of Term — Commencement of Proceeding—Notice of Motion—9 & 10 Will. 3, c. 15.*] The time within which a proceeding for the purpose of setting aside an award under 9 & 10 Will. 3, c. 15, must be commenced, does not include the last day of the term next after the date when the award is made.—Where a submission to arbitration has been made, a rule of the Court of Chancery serving a notice of motion to set aside the award is a sufficient commencement of complaint to satisfy the Act, if the service is made before the last day of the term, next after the time when the award is made. *In re* Corporation of Huddersfield and Jacomb [476

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SUBSCRIBER OF MEMORANDUM — *Company—Contract to take Shares—Collateral Agreement—Payment in Money's Worth—Companies Act*, 1867, *s.* 25.] The 25th section of the *Companies Act*, 1867, has not altered the law with regard to the question of what is a good payment for shares.—The memorandum of association of a company formed for the purpose of purchasing and carrying on the business of *C.* was subscribed by him for 2500 shares, which were of £1 each. It was also subscribed by other persons, by which the number taken amounted to 6265 out of a total capital of 7500 shares; and the company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between *C.* and the company for the sale of the business to the latter for £5000, of which one-half was to be in fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the Registrar of Joint Stock Companies. As between *C.* and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase-money, and he was debited in the books with £2500 due on the shares, and credited with £5000 as the price of the business:—*Held*, that *C.* was entitled to treat the shares for which he subscribed the memorandum as the same shares as those for which he sold his business, and that the shares were paid for in cash within the meaning of the 25th section of the Act of 1867.—*Fothergill's Case* (Law Rep. 8 Ch. 270) and *Spargo's Case* (Law Rep. 8 Ch. 407) considered. *In re* Limehouse Works Company. Coates' Case [169

SUBSTITUTED GIFT—Cumulative gifts - 50
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SURPLUS ASSETS—Company—Shares fully paid and unpaid - - - - 491
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TAXATION OF COSTS—*Redemption Suit—Mortgage under £1000—Higher or Lower Scale.*] In a suit to redeem a mortgage, where the amount due at the time of filing the bill is under £1000, notwithstanding that the mortgage was made to secure a larger amount, the Defendants' costs must be taxed on the lower scale. Cotterell *v.* Stratton - - - - - - 543

TENANT FOR LIFE—Appointment as trustee 351
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—— Apportionment of rent — Mortgagee of tenant for life - - - 283
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TENANT IN TAIL—Payment out of Court—Disentailing deed - - - 300
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TIME—Setting aside award - - - 476
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TOWNS IMPROVEMENT—Local Board of Health—Power to take property - - 524
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TRADE-MARK — *Trade Label — "Nourishing Stout."*] An injunction to restrain the use by the Defendants upon their trade label of the term "Nourishing Stout," which the Plaintiff had previously used, refused, on the ground that "Nourishing" was a mere English word denoting quality. Raggett *v.* Findlater - - 29

TRANSFER OF MONEY IN COURT — Lands Clauses Act—Transfer to suit - 340
See Costs under Lands Clauses Act.

TRANSFER OF SHARES — *Deposit of Shares—Blank Transfer—Custom of Company—Transfer by Instrument in Writing.*] Where the owner of shares borrows money and deposits with the lender certificates of his shares, and also transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest.—Where the articles of association of a company permit a transfer of shares to be made by "instrument in writing," it is not necessary that the transfer should be by deed, even although the uniform practice of the company may have been to require one.—*Marino's Case* (Law Rep. 2 Ch. 596) discussed.—Upon the occasion of a loan being made by *C.* to *F.*, the chairman of the *T. Company*, *F.* deposited with *C.* shares in various companies (including some in the *T. Company*), and transfers thereof, with the date and the name of the transferee left blank. *C.* afterwards deposited the shares in the *T. Company*, and the transfers thereof, with *S.* by way of security for a debt. Subsequently *F.*, being about to pay off his loan, was informed by *C.* that he had pledged the *T.* shares, but did not insist on the share certificates and transfers being delivered up before payment was made. *S.* afterwards filled up the blanks in the transfers, and sent them to the company for registration; but the company having received notice from *F.* that he disputed the validity of the transfers, refused to register them. *S.* applied to the Court under sect. 35 of the *Companies Act*, 1862, to rectify the register by inserting the name of *S.* for that of *F.* The

TRANSFER OF SHARES—*continued.*
articles of association of the company permitted transfers to be made by instrument in writing, but the company had always required transfers to be by deed:—*Held*, that the transfers, although not good as deeds, were valid instruments in writing within the meaning of the articles of association, and conferred on *S.* a good title to the shares at law as well as in equity; that *S.* was entitled to have his name on the register; that the Court had jurisdiction to decide the question of title between *S.* and *F.* (who had been served), but had no jurisdiction to order *F.* to pay the costs: and that the company, having chosen to side with their chairman, who was in the wrong, must pay the costs of the application. *In re* Tahiti Cotton Company. *Ex parte* Sargent - - - - 273

TRANSFER OF SUIT—From County Court to Chancery - - - - 415
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—— Cesser of—Annuity to trustee during trusts
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—— Declaration of—Money not in hands of trustee - - - - - 8
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—— Estate of trustees—Trust to let and cut timber - - - - 252
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—— Precatory—Will - - - 320
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TRUSTEE—Annuity to—Cesser of trusts - 546
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—— Appointment of, under power—Tenant for life - - - - - 351
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—— Appointment of—Charity Commissioners
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—— Power to manage estate — Administration suit - - . - - 24
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TRUSTEE IN BANKRUPTCY—Costs - 130
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TRUSTEE IN LIQUIDATION—*Duties of Trustee—Payment of Money into Bank—Audit of Accounts—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 30, 125, *sub-s.* 8.] In a liquidation by arrangement the creditors may, under sect. 125 (sub-sect. 8) of the *Bankruptcy Act*, 1869, prescribe the bank into which the trustee is to pay the moneys which he receives without passing any formal resolution for the purpose, and evidence is admissible of their having done so.—The provisions of sect. 20 of the *Bankruptcy Act*, 1869, as to the audit of the trustee's accounts apply to liquidation by arrangement as well as to bankruptcy. *Ex parte* Old. *In re* Bright - - - - - 457

UNBORN CHILD—Illegitimate—Gift to - 345
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UNDERLEASE—Like provisions—Covenant not to assign—Consent of lessor - 549
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UNLIQUIDATED DAMAGES—Bequest of "money due at my decease" - - 76
See "Money."

UNSTAMPED BILL OF EXCHANGE—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 16, 48, 54—*Order for Payment of Money—Equitable Assignment—Evidence—Admissibility.*] Before the commencement of their liquidation two debtors had given to one of their creditors a letter addressed to a company for whom they were executing a contract, requesting the company to pay to the creditor £200 "out of moneys payable to us on the completion of our contract." This letter was delivered to the company, but it was never stamped. The trustee under the liquidation applied to the County Court for an order declaring the letter void as against him. The letter was produced by a witness who was examined *ex parte* in support of the application, and was marked as an exhibit. It was not produced upon the hearing of the application by the Judge:—*Held* (affirming the decision of the County Court Judge), that the letter was inadmissible in evidence as being an unstamped bill of exchange, and not an equitable assignment:—*Held*, also, that the creditor who claimed under the letter could not succeed by means of the evidence adduced by the trustee, without production of the letter.—The letter was therefore declared void as against the trustee. *Ex parte* Shellard. *In re* Adams - - - - - 109

VOLUNTARY SETTLEMENT—*False Recital—Recital of Payment of Money to Trustee—Promise to Trustee to pay—Enforcing Promise.*] A trustee executed a settlement declaring trusts of a sum of £2000 belonging to a settlor (a married woman), which sum was thereby untruly recited to be in his hands, upon the faith of a promise by the married woman to pay the sum to him out of her separate estate. The sum was never paid:—*Held*, that neither the trustee of the settlement, nor a volunteer under it, could enforce the promise. Marler *v.* Tommas - - - - 8

VOLUNTARY WINDING-UP—Action by creditor —Injunction - - - 268
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—— Ademption—Contract to sell land to railway company—Notice to treat - - 217
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—— Ademption—Covenant in settlement 78
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—— Annuity—Charge on *corpus* or income 324
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—— Annuity coupled with duty—Trustee 546
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—— Apportionment of rent—Devisee and executor - - - - 288
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—— Legacy free of legacy duty—Deficiency of residue - - - - 419
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—— Precatory trust - - - - 320
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—— Repetition of legacies - - - 50
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—— Residuary gift - - - - 440
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WILL OF MARRIED WOMAN—*Will—Construction—Savings of Separate Estate—"Purchased"—Money at Bank.*] Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":—*Held*, that savings out of separate estate standing to her account at her bankers did not pass. Askew *v.* Rooth - - - - - 426

WINDING-UP—Action by creditor—Injunction
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—— Distribution of surplus assets - - 491
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WINDING-UP PETITION—*Company—Creditor's Petition—Discretion of Court—Petition directed to stand over—Companies Act*, 1862, *ss.* 80, 86, 91.] A creditor of a company who cannot get paid without a winding-up is entitled *ex debito justitiæ* to a winding-up order.—A creditor of a company who has, under sect. 80 of the *Companies Act*, 1862, served on the company a demand for payment of his debt, but has not been paid within the three weeks, is not necessarily entitled to an immediate order for winding up the company.—The 91st section of the *Companies Act*, 1862, is not confined to cases where a winding-up order has been made, but applies also where a petition for winding up is before the Court. *In re* Western of Canada Oil, Lands, and Works Co. - 1

WINDING-UP PETITION—*continued.*

2. —— *Companies Act*, 1862—*Winding-up of Unregistered Company—Railway Company—Incorporation by Act of Parliament.*] The exception from the power to wind up unregistered companies given by sect. 199 of the *Companies Act*, 1862, of railway companies incorporated by Act of Parliament, applies only to companies whose principal object is the construction of a railway, and therefore a company whose principal object is the construction of docks is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks.—Where, in an Act of Parliament incorporating a company, it is stated that the construction of the works authorized by the Act is of public advantage, the Court will be reluctant to make an order to wind up the company, unless it is shewn that there is no other process by which its difficulties can be overcome.—Debenture holders of a company being empowered by Act of Parliament to enforce the payment of principal and interest by the appointment of a receiver:—*Held*, that, until a receiver had been actually appointed and had failed to obtain payment, the Court would not, at the instance of debenture holders, order the company to be wound up. *In re* Exmouth Docks Company - 181

3. —— *Practice—Creditor's Petition—Right of Petitioner to dismiss—Costs.*] A creditor who has presented a petition for winding up, being *dominus litis*, is entitled, on receiving payment of his debt, to dismiss his petition at the hearing; but creditors who have appeared in consequence of the advertisement of the petition are entitled to their costs. *In re* Hereford and South Wales Waggon and Engineering Company 423

4. —— *Company not having commenced Business—Companies Act* (25 & 26 *Vict. c.* 89), *s.* 79.] Where a company had been registered for more than a year without commencing business, and had therefore come within the 79th section of the *Companies Act*, 1862:—*Held*, that the Court could not refuse a winding-up order upon the application of a shareholder, notwithstanding that the company had no money paid up and no debts, and that the order was opposed by a majority of the shareholders. *In re* Tumacacori Mining Company - - - - - - 534

WITNESS—Expenses of—Cross-examination out of jurisdiction - - - 238
See Expenses of Witness.

WORDS—"Money due at my decease" - 76
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—— "Nourishing Stout" - - - 29
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—— "Ordinary trains" - - - 561
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—— "Persons" - - - - 121
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